



Georgia Institute of Technology
Atlanta, Georgia 30332-0420

GEORGIA TECH 1885-1985

DESIGNING TOMORROW TODAY

J. W. Dees, Director
Office of Contract Administration
(404) 894-4810

3 June 1988

Mr. Lloyd:

Attached is a corrected version of my May 30, 1988 letter. The word "universities" has been inserted in line 7 of the first paragraph and the word "no" has been corrected to read "not" in the sixth line of the third paragraph.

Sincerely,
J.W. Dees



GEORGIA TECH 1885-1985

DESIGNING TOMORROW TODAY

Georgia Institute of Technology

Office of Contract Administration

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May 30, 1988

Mr. Charles W. Lloyd
Executive Secretary
ODASD(P)DARS
c/o OASD(PL)(MRS)
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Ref: DAR Case 87-303

Dear Mr. Lloyd:

This letter is submitted in support of the position of the Council on Governmental Relations in their 11 May 1988 letter on the above referenced matter. Georgia Tech, as both a major research university in the area of information technology and developer of computer software which has been successfully commercialized, urges the implementation of a Federal policy on computer software and data which parallels that contained in Public Law 96-517. P.L. 96-517 has facilitated stronger research relationships between research universities and industry. This benefit should be expanded across the broad spectrum of intellectual property.

As was pointed out in testimony given on by M.I.T.'s George H. Dummer on 30 April 1987 before the U.S. House of Representatives Committee on Science, Space and Technology, Subcommittee on Science, Research and Technology, the effective transfer of university generated technology requires the consideration of different (trade secret, patent, copyright) intellectual property rights. Technology can no longer be cleanly categorized as only having one kind of right subsisting within it.

Georgia Tech is one of many universities facing this issue. The technology developed in university laboratories under Federal sponsorship comprises only the starting point for technological innovations which are a necessary part of our maintaining our position in the worldwide scientific community. A progressive, consistent set of Federal policies in the area of intellectual property ownership and rights would have a positive effect which would benefit not only universities, but the nation as well.

We would be pleased to provide additional information at your convenience.

Sincerely

Georgia Institute of Technology

By: J. W. Dees, Director

Office of Contract Administration

cc: Milt Goldberg, Executive Director
COGR



United Technologies Building
Hartford, Connecticut 06101
203/728-6255

Joel W. Marsh
Director
Government Issues

May 31, 1988

Mr. Charles W. Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
ODASD(P)/DARS
c/o OUSD(A) (M&RS)
Room 3D139
The Pentagon
Washington, DC 20301-3062

Dear Mr. Lloyd:

United Technologies Corporation (UTC) appreciates the opportunity to comment on the Department of Defense Federal Acquisition Regulation Supplement; Patents, Data and Copyrights (DAR Case 87-303).

UTC has supported the joint efforts of the Department of Defense (DoD), Department of Energy, National Aeronautics and Space Administration, and Office of Management and Budget/Office of Federal Procurement Policy to develop a regulation that balanced the interests of government and industry based on the President's Policy on Science and Technology, the recommendation of the Packard Commission on Technology, and the will of the Congress as expressed in Public Laws 99-661 and 100-180. Consequently, we were surprised that the interim regulation bears so little resemblance to the proposed approach by the joint agencies.

UTC has also supported the Aerospace Industries Association (AIA) task force which worked with the Council of Defense and Space Industries Association (CODSIA) in developing a composite industry response to this interim regulation. This response provides specific comments on issues which, if incorporated, could improve the interim regulation as currently structured. We wholeheartedly support these recommended improvements and will be available to further assist AIA/CODSIA in supporting your efforts to develop a more equitable final regulation.

Aside from the details provided in the AIA/CODSIA response, we encourage you to focus your attention on what appears to be an inherent philosophical difference in what the DAR Council intends to achieve through the interim regulation and the objectives of the President's Policy on Science and Technology, the Packard Commission's recommendation on Technology, and the Congress as stated in Public Laws 99-661 and 100-180. Although the wording of the regulation is very complex, it would appear that the DAR Council has placed the Government's need for unlimited rights in technical data for competitive reprocurement purposes as the overall and primary objective of the regulation. Any "balancing"

of interests of government and industry in technical data appears to be secondary to that overall objective. The following two points will illustrate: first, data not included in a contract listing is automatically defined as "unlimited rights"; and second, the expansive definition of "required in the performance of a contract" will involve background manufacturing and design technology never before considered as developmental work required under contract. Both will cause forfeiture of valuable property rights and represent radical departures from past regulatory requirements.

In addition, the interim regulation will be unwieldy. The opportunity provided in the regulation for industry to utilize and protect privately developed technology, for example, is administratively burdensome, will necessitate extensive paperwork, and will require systems not currently in existence. Moreover, the approach also appears threatening in today's litigious environment due to the liberal use of the "notification" and "certification" requirements.

The concepts of "list or lose" and "development necessary for performance of a government contract or subcontract" are very broad and do not encourage risk taking on the part of industry to incorporate new or emerging technologies into DoD products. The expanded requirements for paperwork development, paperwork retention, "notification", and "certification" as a part of the bid/proposal process for new contracts will discourage the aggressive use of privately developed technology in defense products. This is especially true when it is recognized that sustaining a successful claim of "limited rights" will be expensive, time consuming and treacherous since a successful claim would be undesirable and inconsistent with the overall objective of the interim regulation.

UTC believes the regulation needs extensive revision without the overwhelming bias in favor of unlimited rights in all categories of data. These revisions could be enhanced through an understanding of the types of technical data and the needs of the government in these data. We believe the issue of rights in technical data is minimal in connection with providing technical data for training, operation, maintenance, overhaul, and repair. We believe that the substance of the technical data issue lies in the area of competitive procurement data. However, the "cast net" approach of the interim regulation in obtaining technical data for government needs fails to recognize the broad range in types of data and industry's willingness and ability to satisfy much of the government's needs in this data. Instead, this

approach focuses extraordinary emphasis on the government's need for unlimited rights in competitive reprourement data. We believe that the issue could be brought to a more satisfactory conclusion by a joint government/industry effort with the specific assignment of satisfying the technical data requirements as mandated by the Executive Branch and in Public Laws.

UTC appreciates the opportunity to comment on this interim regulation. We support any effort that the DAR Council might undertake to work with industry in developing a final regulation that reflects an understanding of technical data issues in an effort to provide a balance between the interests of the parties. If UTC can be of assistance to the DAR Council in developing the final regulation, please feel free to call upon us.

Very truly yours,

Joel W. Marsh
Joel W. Marsh
/ldj

UNIVERSITY OF
ROCHESTER

OFFICE OF RESEARCH &
PROJECT ADMINISTRATION

31 May 1988

Mr. Charles W. Lloyd
Executive Secretary
ODASD(P)DARS
c/o OASD(PL)(MRS)
Room 3D139, The Pentagon
Washington, DC 20301-3062

Subject: DAR Case 87-303

Dear Mr. Lloyd:

The University of Rochester offers the following comments to the interim rule published at 53 FR 10780 under the DFARS Subpart 227.4 - Technical Data, Other Data, Computer Software, and Copyrights. Rochester's sponsored research base this year is approximately \$110 million and represents research for a broad range of disciplines including the School of Medicine and Dentistry, College of Engineering and Applied Sciences, and the School of Arts and Sciences. Rochester has successfully engaged in technology transfer, has an established technology transfer program and has been recognized by industry as having developed technology suitable for development and commercialization by corporations.

Public Law 96-517, as amended, by giving nonprofit organizations and small business the right to own, develop, and commercialize patentable inventions resulting from federally funded research grants and contracts, has facilitated strong research relationships and technology transfer between universities and industry. Since the enactment of this public law, corporate sponsorship has increased by approximately 52% at Rochester. This can be attributed, in part, to the enactment of this law. We also recognize that university-generated technology requires licensing and administration of a combination of intellectual property rights. At Rochester we are researching and developing nuclear magnetic resonance imaging devices that require integrated hardware and software systems, integrated circuits, and chip designs that include or could include a combination of intellectual property rights. The proposed interim rule does not parallel the existing federal policy for patents and technology transfer and consequently will not encourage and will, in fact, make it more difficult to transfer university technology for commercial development.

Section 227.472, "Acquisition policy for technical data and rights in technical data", indicates that only the government can fulfill its obligations of technology transfer and fails to recognize the valuable role that universities have in the dissemination of research results. We recommend under 227.472 -1(b) and 1(c) that language is added that recognizes the contribution of universities and their technology transfer programs.

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Sections 227.472-2 and 227.472-3 (a)(1) is reminiscent of pre-Public Law 96-517 when the government needed to be petitioned by contractors for extended rights to patents. Prior to Public Law 96-517 commercial corporations were not encouraged, guaranteed, nor was the process made easy for universities to collaborate with industry in the transfer of technology. This section will have the same affect on universities and industry. Universities' ability to transfer technical data and software to industry will severely inhibit the strength and vitality of its interactions and technology transfer with industry. The mere existence of the government's unlimited rights, whether exercised or not, will severely limit the transfer and commercialization of technology developed at universities. When one couples this proposed section with the preponderance of new federal grant programs that encourage and require university and industrial interaction and commercialization research activities, one finds that they are at diametric ends. We recommend that government rights should be limited to data in which the government has a need and which cannot be supplied by other means or which is specifically required to be delivered under the terms of the contract. This would effect the transfer of technical data and computer software to both the government and commercial concerns in the same processes and benefits as is required for patentable technology.

In addition to the above recommended changes Rochester recommends that section 227.472-3(a)(2)(ii)(B) be omitted. Publication of research results is a priority of every university; publications, however, are sometimes jointly made with the commercial development of technical data and computer software. The government should not acquire unlimited rights to this data unless it is required as part of the statement of work and the Government should accept GPLR when a small business or nonprofit organization agrees to commercialize the technology.

University technical data and computer software is usually a cumulative result of many years of research and effort with a multitude of sponsors, (i.e. university, federal, foundation, and corporate). Section 227.473-1(b)(2) should be augmented to provide guidance to contracting officers when technical data and computer software accrues from universities and other nonprofits. The government should only be able to acquire GPLR if it does not need to use the data for competition and the university or other nonprofit is interested in commercializing the data.


As discussed above it is very difficult to modify federal regulations for basic research performed at universities. Competitive procurement of items, components, parts and processes usually does not occur at universities. As in recent regulations, i.e. patent regulations, universities were combined with the Small Business Innovative Research Program (SIBR). As an alternative to extensive language modification, Rochester recommends that the SIBR rights in technical data and computer software be modified to include universities and other nonprofits.

Mr. Charles W. Lloyd
Re: DAR Case 87-303

31 May 1988
Page 3

Thank you for the opportunity for the University of Rochester to comment on such important and far reaching regulations for universities and the ultimate transfer of technology to corporations for commercialization.

Sincerely,



Jane A. Youngers
Director

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87-303



May 31, 1988

Defense Acquisition Regulatory Council
The Pentagon
Washington, DC 20301-3062

Attention: Mr. Charles W. Lloyd
Executive Secretary
CDASP (P) DARS c/o OASD (P&L) (MRS)
DAR Case 87-303


Dear Mr. Lloyd:

Aeroquip has reviewed the DAR Council interim changes to Subpart 227.4 and Part 252 of DFARS as published in the Federal Register on April 1, 1988. Aeroquip does not support the proposed changes.

Aeroquip does endorse the comments submitted to you by the Proprietary Industries Association pursuant to the 60 day public comment period. We believe these comments deal fairly with innovative aerospace sub-contractors.

Should additional information be required, please contact the undersigned.

Very truly yours,


Larry Barnhart
Marketing Manager
Product Development

LB:tr

cc: Bettie S. McCarthy
Government Relations Consultant
733 15th Street, NW, Suite 700
Washington, DC 20005

Proprietary Industries Association
220 No. Glendale Ave. Suite 42-43
Glendale, CA 91206
Attention: H. (Bud) Hill Jr., Counsel

Mark A. Conrad
Vice President -
Secretary and General Counsel
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Jackson, MI 49203

Case Management Record

DAR Case No. 87-303	CAAC No.	Original Updated	Date	
Title Tuck Watu				
Reference				
Synopsis Add'l Pub Cmts				
Priority	Submitted By	Originator Code	Case Manager	
Keywords				
Case References				
FAR Cites				
DFARS Cites				
Cognizant Committees	TD			
Recommendation				
Notes				

Case Management Record

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6/27/88

DAR Case No. 87-303		CAAC No.		Original Updated	Date 6/27/88
Title TECH DATA					
Reference					
Synopsis Additional Public Comment					
Priority	Submitted By	Originator Code		Case Manager	
Keywords					
Case References					
FAR Cites					
DFARS Cites					
Cognizant Committees					
Recommendation Assign to Tech Data Comm					
Notes					

87-303

JUN 20 1988

Honorable Robert B. Costello
Under Secretary of Defense
for Acquisition
Department of Defense
The Pentagon - Room 3E808
Washington, DC 20301-1000

Dear Dr. Costello:

We have completed our review of the interim regulation entitled, "Patents, Data, and Copyrights," published in the Federal Register on April 1, 1988. We appreciate your efforts to respond to the issues raised in our letter of February 29, 1988 on an earlier draft of the rule. Also, discussions with your staff have proven most helpful in allaying some of our concerns, particularly with regard to your intentions on the treatment of data rights for items developed solely or predominantly with contractor resources. While I expect that this issue and others raised in this letter will be satisfactorily resolved in the final rule, these comments can, of course, only address the regulation as published. I am concerned that a number of provisions of this interim rule do not appear to meet the President's technology transfer objectives and will not support the Department's goal of achieving cost-effective procurements. In addition, several of the provisions in the final rule do not appear to meet the requirements of the Paperwork Reduction Act and its implementing regulations, which specify that a collection of information: (1) must be necessary to perform the agency's functions, (2) must be the least burdensome method of meeting the agency's need, and (3) must not be duplicative with any other collection by the Federal Government. These concerns are described in detail in the Enclosure.

We have all become increasingly concerned about the impact of changes in procurement statutes, policies, and regulations on the defense industrial base. Clearly the quality and capacity of that base, and our ability to meet future defense needs, must be ensured to achieve the level of national security we demand. The determination of rights in technical data developed using private or Government resources will be a key determinant of our success in this regard.

Our ability to leverage the Government's investment in product development will be influenced significantly by the Department's procedures to protect from release or disclosure

technical data pertaining to a product developed at private expense and to encourage commercialization of Government funded technologies. Since the Department's regulatory procedures on rights in technical data will affect the expected rate of return on initial or subsequent contractor investment, the contractors' incentives for product innovation and their willingness to provide high quality products for the defense market also will be influenced by these regulations.

For any contractor to invest scarce resources in the initial or further development of a technology, he must be assured of a reasonable return on that investment. The potential for disclosure of technical data to potential competitors, and the Government's discretionary control of that disclosure, will increase the risk associated with any investment and possibly reduce the incentives for the contractor to absorb that risk.

Technical data represent special types of commodities with unique problems, in that disclosure of these data can generally be accomplished very easily and, once disclosed, the commercial value of the technology is significantly diminished. Thus, to provide the necessary incentives to develop and market new technologies, the Government must be especially attentive to the need to manage effectively our demand for, and access to, technical data and provide the appropriate protections from disclosure regardless of the source of funding for the data.

If, through Government disclosure of the technical data, a competitor can replicate the technology, then the contractor who spends his scarce resources to develop the original product or enhance significantly an existing product is at risk of being unable to recoup the full costs of development, let alone obtain a reasonable return on that investment. If the Department, through its technical data regulation, unnecessarily imposes additional risk of disclosure and, thereby, reduces the expected return on the contractor's investment in product development, which is frequently far in excess of the initial research investment, then the contractor's incentive to make that investment will be reduced. More importantly, the contractor may decide not to sell in the defense market or to sell the Department second or third best technologies.

We also strive to achieve effective competition. To obtain competition among suppliers for a product or process developed using Government funds, a potential Government contractor may need to have access to technical data pertaining to that product or process. Again, however, we must be particularly careful not to unilaterally acquire and

disclose technical data developed using Government or private funds only to lose opportunities to purchase the best technologies to meet our defense needs and significantly enhance competition in the long term.

Similarly, we can enhance the competitive base through our regulatory policies if we specifically and emphatically endorse contractor innovation. Competition can be effectively stimulated by providing the necessary incentives for the contractor to take full commercial advantage of our technologies, not only to increase the ability of domestic industries to compete internationally, but also to meet our defense needs more effectively. To this end, contractors should be given strong incentives to develop new products and improve existing products developed under Government contract.

The opportunity costs of lost innovation or reduced competition are easy to ignore, since regulations that discourage technological innovation will not be recognized in the acquisition system for some time. However, if we concern ourselves only with immediate and seemingly more pressing needs, then we risk losing in the longer term our defense readiness and technological advantage.

We must recognize that a technical data rights regulation that will maintain or, where necessary and possible, enhance the defense industrial base may have short term costs. The contractor who develops a superior product or process will realize a higher profit in the short term relative to his competitors. Thus, for a period of time, the inventor's and the Government's interests may appear to diverge. However, the protection of the contractor's economic interest is absolutely essential to encourage the contractor to invest in the development of the product or process in the first place. If the contractor cannot be assured of keeping the invention secret at least for a time, then he will not invest and the Government will not have access to the technology. Therefore, effective protection of technical data, regardless of the source of funding, is in the Government's best interest.

The Department seems to recognize these concerns. In the general policy statement, the Department indicates that it will obtain only the minimum essential technical data and data rights and will do so in a manner that is least intrusive to the contractor's economic interests. However, the rule lacks the essential ingredient to implement that policy--the procedures that the contracting officer must use to determine what technical data the Department specifically needs and how to meet those needs in a manner that is least damaging to the contractor's economic interest. In our

February 1988 letter, we urged the Department to include such procedures in the final rule. We continue to view these procedures as absolutely essential to ensure that the Department will have access to advanced technologies to meet our defense needs and that it can meet those needs in a cost-effective manner. We recommend that the Department include such technical data acquisition procedures in the rule. These technical data acquisition procedures would then complement the existing requirements at 217.72, which specifically direct the contracting officer, presumably after consultation with the other members of the project team, to "decide whether to procure data for future competitive acquisition" in accordance with the provisions of Part 227. If it is considered inappropriate to include such procedures in the rule, at a minimum, they should be identified with a Departmental Directive or Instruction, and specifically referenced in the rule. Our clear preference, however, is for these procedures to be included in the rule itself.

We recognize the Department's concern that future competition may be held hostage to a critical element that the contractor chooses to develop at private expense. But we should be especially careful not to threaten a contractor's legitimate proprietary technology to eliminate such a possibility. We have serious concerns that the new definitions in Section 227.471 of "developed exclusively at private expense" and "developed exclusively with Government funds" will not provide the protections from disclosure that are necessary to encourage contractors to sell their proprietary products to the Government and will not promote private resource investment in the development of defense technologies. The classification of technical data as "developed exclusively at private expense" or "developed exclusively with Government funds" is contingent on whether the item, component, or process to which the data pertain is "required as an element of performance under a Government contract or subcontract," or, as this is defined in the rule, "development was specified in a Government contract or subcontract or that the development was necessary for performance of a Government contract or subcontract." Under the Department's rule, for example, the definition of "developed exclusively with Government funds" will apply to all technical data pertaining to an item, component, or process when its development is necessary for the performance of a contract, even if it was developed solely or predominantly with contractor resources. The Department can then claim "unlimited rights" in those technical data, which includes the "rights to use, duplicate, release, or disclose...in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so." Thus, technical data pertaining to proprietary products or products in which the contractor has invested substantial resources will not be protected. This indirect

means of obtaining "unlimited rights" to what would logically be considered proprietary technical data does not appear to respond to the requirements of the Defense Authorization Act of 1987 or the draft policy developed in accordance with Executive Order 12591. Moreover, I do not believe that it is your intent to acquire unlimited rights in this manner. I recommend that in the definition of "required as an element of performance" the Department delete the reference to "development was necessary for performance of a Government contract or subcontract," to eliminate any uncertainty about how the definition would be applied.

Several of the requirements appear to be largely redundant and, hence, inconsistent with the requirements of the Paperwork Reduction Act and its implementing regulations and the Department's regulatory simplification objectives. The absence of a link between the notification requirements in Section 227.473-1 and the listing requirement in Section 227.472-3(a) is particularly confusing. For example, the Department's rule appears to require at least four documents from the contractor that identify the rights in technical data: (1) a "preaward notification" (227.473-1(a)(2)) to identify products or processes that would result in the delivery of technical data to the Government with other than unlimited rights; (2) "continual postaward notification" (227.473-1(a)(3)) to continue notification during performance of the contract; (3) a "certification" (227.473-1(a)(4)) to identify the contract under which the data are or were delivered, the expiration date and limitation on the Government's use, and an authorization for the contracting officer to request additional information to evaluate the assertions; and (4) a "listing" (227.472-3(a)) of technical data delivered to the Government with other than unlimited rights. These requirements, as drafted, appear to be duplicative and, hence, do not provide the least burdensome means to achieve the Department's objectives. If the rule is not referencing four distinct lists but rather one list that may be updated at different times, then an easy way to clarify this would be to provide a descriptive name for the list, and refer to this same list throughout the rule. In any regard, we recommend that the Department reduce the notification procedures to one set of consistent, nonduplicative requirements for identification of rights in technical data.

The listing requirement raises other concerns as well. Under the Department's rule, for example, if a contractor fails to include in the list technical data pertaining to a privately developed product, then the Government will claim "unlimited rights" to such data. Failure to include proprietary data on a listing should not serve as a means for the Government to obtain "unlimited rights" to privately developed

technologies. The Department has other provisions in the rule that will meet its needs for identification, notification, and verification while protecting the contractor's property and economic interest. Unfortunately the listing requirement at 227.472-3(a) appears to be a "gotcha" provision with no further attempts by the Government to clarify rights in the technical data, particularly when the data are marked in a manner that is inconsistent with the listing. We recommend that the Department reconsider the use of listing requirements in Section 227.472-3(a) as a means of claiming "unlimited rights" in technical data, or at least, provide procedures in the rule to allow contractors an opportunity to correct errors in the designation of data rights.

The Department's rule indicates in Section 227.473-1(b) that the contracting officer should not negotiate Government Purpose License Rights if the technical data are needed for immediate competition and if protection of the contractor's rights would be "unduly burdensome on the Government." The application of the "immediate competition" test should be rather limited, since the negotiation with the developing contractor regarding rights in technical data should take place in the early stages of the research and development contract. It is difficult to foresee a situation, except perhaps a national emergency, in which the Government would compete a product before the development had been completed. The test of "unduly burdensome" also is undefined in the Department's rule. This test should be clarified through specific procedures regarding the acquisition of technical data or rights in technical data. Thus, the need for such procedures on how and when to acquire rights in technical data is further emphasized. We, therefore, recommend that the Department delete Section 227.473-1(b)(2)(ii)(B) of the rule and substitute a reference to the acquisition procedures as discussed above.

And, finally, I would urge that the Department review and, wherever possible, simplify the contract clauses in the rule. Since in many cases these clauses trigger activities that are covered under the Paperwork Reduction Act, we must be assured that they are the least burdensome necessary to meet the Department's specific needs. In accordance with the Department's recent request, we will provide you with some suggested changes to the clauses to meet these objectives.

I appreciate your consideration of these comments.

Sincerely,

Allan V. Burman

Allan V. Burman
Deputy Administrator and
Acting Administrator

Enclosure

Summary of the Issue

Public disclosure by the Government of technical data developed using private or Government funds can cause serious hardship to the developing contractor, reduce the commercial value of the technology, and thereby jeopardize the incentives necessary for the contractor to develop and market new technologies for the private and Government markets. Even the mere threat of public disclosure by the Government will reduce the expected return on the firm's research, development, and marketing of the technology and, consequently, will reduce the incentive for a firm to incur the often substantially greater cost to develop new products or processes for military and commercial markets.

In a recent paper published by the National Bureau of Economic Research, these characteristics of technological innovation were highlighted:

"The new knowledge or innovation may be a cost-reducing process, a product, or some combination of the two. The knowledge-producing firm earns a return either through net revenues from the sale of its own output embodying the new knowledge or by license and nonmonetary returns collected from other firms which lease the innovation. Since the private rate of return to research depends on the present value of the revenues accruing to the sale of the knowledge produced, the conceptually appropriate rate of depreciation is the rate at which the appropriable revenues decline for the innovating firm. The rate of decay in the revenues accruing to the producer of the innovation derives not from any decay in the productivity of knowledge but rather from two related points regarding its market valuation, namely, that it is difficult to maintain the ability to appropriate the benefits from knowledge and that new innovations are developed which partly or entirely displace the original innovation." (Ariel Pakes and Mark Schankerman, "Obsolescence, Research Lags, Rate of Return to Research," in R&D, Patents, and Productivity, 1984, pp. 74-75.)

The Government, through its regulations and technical data management, will affect the rate of decay of revenues from investment in technological innovation. When, as a consequence of potential disclosure of his technology, the contractor is at-risk of being unable to recoup the full costs of development of a product or process, including a reasonable return on that investment, then the contractor will increase the expected rate of decay of potential revenues and, correspondingly, will lower the expected rate

of return on the investment. As a consequence of the diminished return, the contractor often may decide not to develop the product or process or, in an effort to limit the risk of disclosure, not to provide the product or process to the Government market at all.

Protection of technical data for a period of time, and hence protection of the economic interest of the developing contractor, is necessary to ensure that the technology can be effectively used in the development of new and improved products and processes for the private and Government markets. Protection of technical data, therefore, should not be considered merely of concern to the contractor. It should also be a high priority of the Department of Defense. In the absence of protection of technical data regardless of the source of funding, the Government will lose significant opportunities to enhance the industrial base, promote contractor investment in the continued development and production of high quality, high performance defense products, ensure Government access to these products, and provide for the long term competition necessary for cost-effective procurements.

While the Government sometimes needs technical data pertaining to items, products, or processes it procures, many of these Government needs can be effectively and efficiently met by ensuring Government access to the technical data rather than the Government's physical possession of the technical data. Physical possession of the technical data by the Government, in many cases, wastes Government resources and unnecessarily jeopardizes the commercial value of the technology. The Government can often meet its procurement needs more cost-effectively through direct licensing and nondisclosure agreements between the respective contractors.

Risk of Disclosure under the Freedom of Information Act

The risk of disclosure of the technical data is heightened by the potential for competitors to obtain valuable technical data through a Freedom of Information Act (FOIA) request. The Department of Justice in a May 1987 letter to USAF General Skantze has indicated that technical data appear to fall within the definition of "records" under the Records Disposal Act (44 U.S.C. 3301), which includes:

"books, papers, maps, photographs, machine readable materials, or other documentary materials...made or received by an agency of the United States Government under federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor...because of the informational value in them."

The Department of Justice also noted that Section 2328 of Title 10 clearly contemplated release of technical data to a person requesting such release under FOIA. Regarding the contractor's proprietary technical data, the Department advised that:

"As a threshold matter, any technical data submitted under a procurement contract containing a restriction on the rights of the United States to release or disclose could not be disclosed under the FOIA, and FOIA requests for such material can be summarily denied. The 1986 amendments to 10 U.S.C. 2320 are particularly clear on this point. Should a FOIA request be filed with respect to any technical data as to which the contractor claims proprietary rights which have not been finally determined, all appropriate challenge procedures for determining such rights under 10 U.S.C. 2321 or other applicable law or regulations should be followed in full before any such data can even be considered for disclosure pursuant to the FOIA. Thus, there is no conflict between the FOIA and the DOD procurement laws protecting contractors' proprietary rights in any technical data: to the extent that disclosure of the data is restricted by law, including during any period needed to validate the proprietary data restrictions under applicable law, the data need not (indeed cannot) be disclosed under the FOIA, and FOIA requests for such materials, accordingly, can and should be denied."

However, because the courts have viewed the statutory exemptions as basically permissive, the agency would appear to have the discretion to disclose such technical data. Consequently, the Government contractor will be continually at-risk of losing even his proprietary technology to a competitor via a FOIA request.

While the Justice Department indicates that protection of technical data pertaining to an item, component, or process developed solely by the contractor can be provided, these discretionary protections may not apply to technical data developed partly or wholly with Government funds. The courts may conclude that Government contracts that permit the contractor to retain such technical data for exclusive commercial use are not sufficient to create the potential for exemption as proprietary technical data. In which case, the Government's efforts to promote effective and more extensive use of our technologies may be completely thwarted by FOIA requests directed solely at discovery of the developing contractor's valuable technology. The Government's physical possession of the technical data, because such action creates an "agency record," could then trigger a FOIA request from a competitor and the commercial value of the technology will be diminished.

Research by Thomas Susman indicates that contractors do and should seriously consider the possibility of disclosure of technical data under FOIA. He also notes that the added risk of such disclosures ultimately damages the Government:

'What little empirical data there are on the impact of the FOIA on government contractors are quite disturbing. In the late 1970s an author surveyed major Air Force contractors and procurement officers and concluded: "Some of the major aerospace contractors are withholding state-of-the-art technology from their proposals to prevent release via the Freedom of Information Act." Similarly, a series of interviews with high technology firms in the Boston area revealed that "several firms did cite the fear of losing proprietary technical information as a primary factor in their decisions not to compete for government-contract work." ("Risky Business: Protecting Government Contract Information Under the Freedom of Information Act," Public Contract Law Journal, 1986, p. 19.)

While Susman acknowledges the potential for withholding confidential commercial information under Exemption 4 of the Act, he also notes that meeting the requirements of this exemption is often difficult and acceptance by the courts of this exemption for technical data is not assured. He states that:

"Counsel advising a government contractor on the possible risk of later disclosure of information provided to an agency will thus seldom be able to give a firm opinion on whether specific data will definitely be withheld from disclosure. (That agreements with agency personnel over the confidentiality of information are not enforceable only exacerbates the situation.) Unfortunately, not only is the substantive application of the fourth exemption to contractor information unsettled, but the procedures surrounding how agencies and courts make those determinations are equally unsettled...no matter how careful the contractor, submitting sensitive commercial information to the government remains risky business." (pp. 22, 27)

The Government can successfully reduce the additional risk that FOIA implies for technological innovation by severely limiting the technical data physically acquired by the Government. The Government can often successfully meet its needs by ensuring access to the necessary technical data through direct licensing or nondisclosure agreements between the respective contractors as opposed to Government possession and subsequent distribution of the data.

Some Benefits of Protection and Transfer of Technical Data

If the Department is to have access to state-of-the-art technologies and increase competition, then we must provide the necessary regulatory environment for the technological investment to occur. The 1988 Economic Report of the President presented some of the reasons for protection of technical knowledge and benefits of technology transfer by the Government:

"Investment in knowledge, like other investment, depends on rights to future returns. Even in research that is publicly supported, the incentives created by property rights have powerful effects. Patent, licensing, trademark, copyright, and trade secrets laws are critical in determining the share of the returns from commercially valuable ideas and inventions to which an inventor or investor is entitled. The dramatic advance of commercial biotechnology since 1980, for example, was aided by the U.S. Supreme Court decision that microorganisms produced by genetic engineering were patentable. Federally sponsored research can benefit from the incentives created by property rights. The Patent Law Amendments of 1980 provided a uniform system for assigning title to inventions made at universities that conduct government-sponsored research. Between 1980 and 1986 cooperative ventures increased, and the number of patents issued to American academic institutions grew by 70 percent. Before these reforms, patenting such inventions was uncertain, and cooperative research ventures between private firms and universities were difficult to establish because of the complex regulations that accompanied Federal funding." (p. 184)

Similarly, Kamien and Schwartz in a 1982 study found that:

"Stories of government-sponsored research failing to reach fruition in the form of commercially available new product or process revolve around the unwillingness of firms to engage in their final development and marketing without exclusive rights. For example the unwillingness by the Department of Health, Education and Welfare to grant exclusive rights, in the form of patents, to private pharmaceutical firms retarded commercial development of an early blood test for breast and digestive tract cancer and a test-tube method for testing the effectiveness of different cancer drugs before administering them to a patient." (Market Structure and Innovation, p.17)

In a recent report on the results of Public Law 96-517, the Small Business Innovation Development Act, which gave nonprofit organizations and small businesses the right to

retain title to Federally funded inventions, the GAO noted that, while a full evaluation of the commercial consequences of the Law is premature, a significant increase in business financial interest in university research has occurred:

"Administrators at 25 universities stated that Public Law 96-517 has been significant in stimulating business sponsorship of university research, which has grown 74 percent from \$277 million in fiscal year 1980 to \$482 million in fiscal year 1985 (in constant 1982 dollars)." ("Patent Policy Recent Changes in Federal Law Considered Beneficial," April, 1987, p. 3.)

This increase in private business commitment clearly indicates that the private sector expects significant returns from the commercial application of these inventions. According to the GAO, over 900 patents were issued to universities in 1987 -- four times the number issued in 1976, the last year the statistics were collected by the Department of Commerce, and prior to implementation of regulations to permit universities to have the rights to inventions developed under Government contract. Although these data are not conclusive, they certainly suggest a resurgence of innovative effort in the university community that is strongly correlated with legislation permitting them to retain rights to inventions developed using Federal funds.

Effective transfer of Government-funded technologies to contractors and protection of the contractor's investment in further development and marketing of the technologies for a period of time will in the long term enhance competition. In a recent report, the Office of Technology Assessment (OTA) noted the significant cost savings that can accrue when technological advances widen the competitive base. For example, OTA reported that:

"One of the classic illustrations of a successful, major Government contribution to information technology R&D is in the field of satellite communications. The National Aeronautics and Space Administration...had the leading role in pioneering technological progress toward commercial development, accelerating the time frame for the introduction of this technology, influencing the structure of the U.S. domestic and international telecommunications common carrier industries, and effecting significant cost savings over the long run.

It is also interesting to note that these NASA programs likely had some important side-effects on the structure of the U.S. international satellite communications industry. Because AT&T was the only private company to have heavily invested its own funds for satellite communications R&D...it is likely that AT&T would have dominated the new international and domestic satellite

communications services industry. Instead, the NASA programs, through continuous transfer of technology to, and close interaction with, commercial firms stimulated the competition that followed the 1972 Federal Communication Commission's decision allowing open entry into the domestic satellite communications services industry." (Information Technology R&D: Critical Trends and Issues, February, 1985, pp. 30, 31.)

Federally-funded research and development also has been shown to be a factor that encourages privately-funded R&D. In about one-third of the cases studied, firms invested their own private funds into projects identified during the performance of Federally-funded R&D projects. The likelihood of such spinoffs was found to be considerably enhanced if the firm helped to formulate the ideas on which the project was based. (Mansfield, "R&D and Innovation," National Bureau of Economic Research, 1984)

This is not to suggest that transfer of technologies developed under Department of Defense contracts will result in a blizzard of new products and processes for consumer use. Indeed, the more significant and immediate beneficiary of an effective technical data regulation will be the Department of Defense.

The President's Policies

The President's policies concerning technology transfer have recognized and responded to the need for more effective and extensive technology transfer to the private sector. In the Memorandum on Patent Policy (February 1983), the President charged Federal agencies to promote the commercial use of inventions arising from Federally funded research and development. In his Competitiveness Initiative (January 1987), the President tasked Federal agencies to help commercialize non-patentable results of Federally funded research by permitting contractors to own technical data developed under Government contracts. In Executive Order 12591 (April 1987), agencies, under the guidance of the Office of Federal Procurement Policy (OFPP), were required to develop a uniform policy permitting Federal contractors to retain rights to technical data developed under Government contracts in exchange for royalty-free use by the Government. A draft OFPP policy implementing this requirement of the Executive Order was provided to the Department of Defense in October 1987, was presented to the Vice President's Task Force on Regulatory Relief in January 1988, and was provided as an attachment as "Basic Regulatory Requirements" to our February 29, 1988 letter to the Department.

The President's Blue Ribbon Commission on Defense Management (the "Packard Commission") raised serious concerns about the

Department of Defense's acquisition of rights in technical data, concerns which in many respects apply Government-wide.

- o The Commission found that contracting officers generally require delivery of technical data even when the need for the data is not identified or when there are other means to achieve the necessary competition that may be less damaging to the contractor's commercial interests and potentially less costly for the Government.
- o The Commission also concluded that the Department's lack of recognition that a mix of public and private funds in developing new militarily useful items or processes is desirable and should be encouraged has resulted in a policy that discourages private investment in such technology.

The Commission stated that the Department obtains technical data that exceed its needs, and thereby removes incentives from innovators to develop and exploit publicly funded technology for commercial use, makes publicly funded technology more readily accessible to foreign competitors, and is out of line with congressional and executive statements concerning inventions made under Government contracts.

The Packard Commission also provided recommended specific policy changes to respond to these concerns.

- o The Department, except for technical data needed for operation and maintenance, should not, as a precondition for buying the product, acquire unlimited rights in data pertaining to commercial products or products developed exclusively at private expense.

"Private expense" as defined by the Commission included funding for the development of an item, component, or process has not been reimbursed by the Government and was not required as an element of performance under a government contract. "Private expense," according to the Commission, should include IR&D and B&P funds, even if reimbursed by the Government.

- o If the Department seeks additional rights in order to establish competitive sources, it should acquire these rights in the least intrusive manner possible, e.g., directed licensing.
- o The Government should be prohibited from acquiring technical data rights pertaining to commercial

products except those technical data, or rights in data, necessary for operation or maintenance of an item, component, or process purchased by the Government.

- o Where significant private funding was provided in a mixed funding case, the developer should be entitled to ownership of the resulting data subject to a license permitting use internally and use by contractors on behalf of the Government. If the Government provides a significant portion of funding, the license should be on a royalty-free basis. In other cases, the Government's use should be provided on a reduced or fair-royalty basis.
- o If the products are developed exclusively with Government funding, the developing contractor should be permitted to retain proprietary position in those data not required to be delivered under contract or, if delivered, not needed by the Government for competition, publication, or other public release.

Objectives of the Regulations

In accordance with these concerns and policies, for the purposes of assessment of the Department's regulation, we have identified five critical objectives of a technical data rights program:

- [1] Provide the necessary protection of a contractor's or subcontractor's proprietary and economic interests in technical data pertaining to an item, component, process, or identifiable subpart thereof developed using private or Government funds.
- [2] Achieve maximum long-term return on our research and development resources by promoting the use of technologies developed with Government funds in the production and marketing of new and improved products and processes for the Government and private markets.
- [3] Increase the long-term competitive base for all procurements by encouraging firms to offer their products with state-of-the-art technologies to the Government as substitutes for products of lower quality or performance and to avoid the loss of technological advantage in our national defense.
- [4] Reduce the Government's direct and indirect costs of managing technical data pertaining to items, components, processes, or identifiable subparts by requiring that, regardless of the source of funding, the Government

obtain royalty-free access to the technical data developed with Government funds rather than physical possession of the technical data.

In certain identifiable cases, the contracting officer should be prohibited from acquiring technical data, such as when the product or process is sold in significant quantities in the commercial market.

- [5] Limit the paperwork requirements to those necessary to meet specifically identified Government needs and minimize the burden on contractors and subcontractors of collecting and providing those technical data to the Government.

The Department's Regulation

[1] Acquisition Procedures. The Department states in the interim rule that, as general policy, it will acquire only the minimum essential technical data and data rights and will acquire them in a manner that is least damaging to the contractor's economic interest. However, the Department's rule lacks the essential regulatory ingredients to implement that policy. To ensure cost-effective defense procurement and to provide the necessary incentives for product innovation and competition, the regulation must provide more specific guidance for the contracting officer on when and how the Government should pursue its rights in technical data and, where appropriate, acquire greater rights in technical data.

These acquisition procedures must be integrated with the provisions of the rule that define the standard rights in technical data, since the Government's specific needs should correspond to the technical data rights acquired--the solution to the particular need or problem. Since these procedures would define how the Government would exercise its rights in technical data, they also should dovetail with the conditions under which the contractor will retain limited rights, obtain Government Purpose License Rights, or provide unlimited rights in the technical data. These procedures will then complement the existing regulatory requirements at 217.72, which specifically direct the contracting officer, after consulting with the other members of a project team, to "decide whether to procure data for future competitive acquisition."

[a] Specific Acquisition Procedures. Since the Department's rule provides only general policy guidance on technical data acquisition, the contracting officer, rather than proceed into uncharted territory, will most likely adopt the standard rights in technical data as defined in Section 227.472-3 of the rule as a "default" procedure. This can easily lead to

acquisition of, or claim to, rights in technical data that exceed those necessary to meet the particular needs of the Department, which in turn will result in losses in technological advantage and long term competition. For example, regardless of whether the Department needs those rights or whether the Department can meet its identified needs in a manner that is less damaging to the economic interest of the contractor, the Department under this rule will obtain unlimited rights in technical data previously delivered with limited rights or Government Purpose License Rights which have expired. Similarly, while the rule provides that "to encourage commercial utilization of technologies developed under Government contracts, the Government may agree to accept technical data subject to Government purpose license rights (GPLR)," because the contracting officer is provided with no specific guidance on when that approach is acceptable, the use of GPLR will be very limited.

To achieve a more effective allocation of rights in technical data, we urge you to include a set of acquisition procedures in the rule. These procedures in effect would serve as a set of screening devices, first to reduce the Department's data rights acquisition to only those specifically needed by the Government, and, second, where access to the technical data is necessary, to ensure that those needs are met in the manner that provides for full consideration of the potential damage to the economic interests of the contractor.

The use of these acquisition "screens" would compel the contracting officer to: (1) identify the need for the data, (2) fit the solution to that need, and (3) include in his determination of the appropriate solution the potential damage to the economic interest of the contractor. For example, technical data pertaining to form, fit, or function, technical data necessary for repair, operation, maintenance, or training activities, technical data prepared or required to be delivered that constitute corrections or changes to Government-furnished data, and technical data otherwise publicly available would be caught by the "first screen" and deemed "unlimited rights" data by the Government. These technical data generally are essential for the effective and efficient operation of the agency. The Department would then further screen the remaining technical data developed exclusively with Government funds to determine those necessary to meet other specifically identified needs. The Department would determine the best means to both meet the Government's specific needs and limit the damage to the potential commercial use of the technology. A "third screen" would identify those technical data developed exclusively with Government funds for which we have no clearly identified need but want to retain the right to obtain access to the data in the future under a deferred ordering arrangement. Technical data pertaining to items, components, or processes

developed at private expense, except in very limited circumstances, should not be acquired by the Department at all. Thus, to continue the above analogy such data should pass through all of the Government acquisition "screens."

In our February 1988 letter, we provided a set of such acquisition procedures. We continue to view these procedures as absolutely essential to meet the objectives of the technical data regulation. We therefore recommend the following as a replacement for Section 227.472-2 in the Department's rule:

227.472-2 Procedures for acquiring rights in technical data:

Regardless of the source of development funding for the item, component, identifiable subpart, or process, before acquiring technical data or rights in technical data pertaining to that item, component, subpart, or process, except as specified in 227.472-3 (a):

(a) The Government should not acquire technical data or rights therein, unless the contracting officer determines that the Government will need to reproduce the item, component, identifiable subpart, or process pertaining to the technical data and none of the following conditions apply:

(1) The original item, component, subpart, or process or a readily introducible substitute that will meet the performance objectives is commercially available;

(2) Performance specifications or samples of the original item, component, or subpart, or demonstrations of the process will provide sufficient information to potential contractors;

(3) The contractor or subcontractor developing the technical data will permit through direct licensing or nondisclosure agreements or other means other potential competitive sources of supply to use the technical data to furnish the item, component, subpart, or process to the Government.

(b) (1) If the requirements of (a) have been met, then the contracting officer should assess whether the expected savings from meeting procurement or other clearly specified objectives through the acquisition of technical data or rights in technical data relating to an item, component, identifiable subpart thereof, or process are likely to exceed: (i) the full costs of acquiring such data or rights in such data, including additional costs to the Government; and (ii) the full

costs of other alternatives (see (a)) and feasible proposals identified in consultation with the contractor or subcontractor that may meet the Government's objectives.

(2) The contracting officer should actively consider the alternative(s) for which the expected net savings (expected savings minus expected full costs) are likely to be maximized. If the expected savings do not exceed the expected costs for any alternative, then the contracting officer should omit such alternative(s) from active consideration.

(3) If, in accordance with the requirements in (a), the contracting officer concludes that acquisition of greater rights in technical data developed at private expense is necessary, the Government should negotiate and enter into a separate agreement with the contractor and include as an express contract provision all limitations or restrictions on its right to disclose the technical data outside the Government.

(c) When the requirements of (a) and (b) have been met and the contracting officer concludes that the acquisition of technical data or rights in technical data is necessary, the contracting officer should negotiate to acquire and use the technical data or rights in technical data to meet its specific needs in a manner that is least damaging to the developing contractor's or subcontractor's identified property rights and economic interests. Such release or disclosure of the technical data by the Government to a third party will be subject to a prohibition against further release, disclosure, or use of such technical data for commercial purposes by the third party unless otherwise permitted by the developing contractor or subcontractor.

The provisions at (a) would prohibit the contracting officer from considering acquisition of technical data when alternatives clearly exist that will meet the Government's needs with less damage to the contractor's economic interest in the technology and less short and long term cost to the Government.

The provisions at (b) would provide guidance to the contracting officer in the assessment of alternatives to Government acquisition and physical possession of technical data. Most importantly, these provisions would encourage the contracting officer to solicit actively proposals from the contractor on how to meet the Government's needs with less damage to the commercial value of the technology. Clearly, if the contractor's proposals do not adequately address the

Government's needs, would require substantial resources to implement and administer, or appear to be frivolous, then the contracting officer would reject them in accordance with the provisions in (b)(2). The dialogue with the contractor as envisioned here would be virtually costless. However, the benefits to the Government are likely to be significant, since this dialogue would promote consideration of all feasible alternatives and reduce the opportunity costs associated with losses of technological advantage and reductions in the competitive base.

The provisions at (c) simply state that, if the Department must exercise or acquire rights in technical data beyond those specified as "unlimited rights" in Section 227.472-3(a), it would provide, wherever possible, protections against further disclosure.

[b] Conditions for Commercial Use of Technologies Exclusively Funded By the Government. The acquisition procedures presented above would be supplemented by more explicit guidance for the contractors and contracting officers regarding implementation of Government Purpose License Rights. The Department's Section 227.472-3(a)(2) should be replaced with the following:

Section 227.472-3(a)(2) It is the policy of the Government to encourage the use of technologies developed under Government contracts for commercialization. When the development of an item, component, identifiable subpart thereof, or process was developed exclusively with Government funds and access by or on behalf of the Government to the technical data relating to that item, component, identifiable subpart, or process is required, the Government will obtain Government Purpose License Rights if: the contractor or subcontractor notifies the contracting officer of its intent to commercialize the technology depicted or described by the technical data, unless the technical data must be publicly disclosed to meet the Government's specifically identified objectives and the requirements of Section 227.472-2 have been met.

(i) Government Purpose License Rights shall be royalty-free and subject to reasonable time limitations as agreed to by the parties. Time limitations are necessary to ensure that the technology embodied in the technical data is not suppressed or abandoned and to offer commercial opportunities to other parties. Time limitations may be determined in part by the contractor's contribution to the development of the technology, the contractor's past history of commercialization of technologies developed under Government contract (if known), likely economic life of

the technology, and an assessment of the potential net social benefits that may be provided by an expansion of commercial opportunities to other parties.

(ii) The Government should negotiate with the developing contractor or subcontractor any procedures (for example, those to be specified in any direct licensing or nondisclosure agreements) that may be required to ensure that the Government has the necessary access to the technical data to meet the Government's competition objectives. These procedures should be specified in an agreement as soon as practicable during the research and development phase of the contract under which the technical data are developed. Such agreements may include an option for any future licensee to purchase technical assistance from the developing contractor. The contracting officer should negotiate payment to be made to the developing contractor in accordance with the costs of providing technical assistance and that contractor's contribution to the development of the technical data.

(iii) If the contractor or subcontractor does not notify the contracting officer regarding an intent to commercialize the technology, does not agree to commercialize the technology within a reasonable time period, or fails to comply with any agreements concerning use of the technical data by or on behalf of the Government, then the Government may obtain unlimited rights in such technical data and all requirements in these regulations that pertain to unlimited rights data will apply.

(iv) If the requirements of Section 227.472-2 have been met and the Government concludes that the acquisition of technical data or rights in technical data is necessary, then the Government should not impose any limitations or restrictions on the contractor or subcontractor's concurrent right to also use the data for its own commercial purposes (unless specifically prohibited from doing so by statute or for national security reasons). Any release or disclosure by the Government to a third party or use by a third party for Government purposes of the technical data to which the developing contractor has obtained exclusive commercial rights will be made subject to a prohibition that the third party may not further release, disclose, or use these technical data for commercial purposes unless otherwise permitted by the developing contractor.

(v) All direct costs incurred by the developing contractor or subcontractor to negotiate the rights to commercialize a technology developed with Government funds and any procedures to provide Government with

necessary access to the technical data are not reimbursable by the Government.

The conditions at (a)(2)(ii) would provide that a contractor, who for a period of time receives the exclusive right to use the technologies developed exclusively with Government funds, would be obligated as appropriate to provide the corresponding technical data to other potential suppliers. The Government and the developing contractor would specify in a contract how an exchange of such technical data would be made between the developing contractor and any potential suppliers. With this approach, the Government would not become directly involved in the distribution of the technical data unless the developing contractor fails to meet the exchange conditions as specified in a contract, in which case he would lose the commercial rights and the Government would claim unlimited rights to those technical data. Clearly, if the contracting officer should have any serious reservations about the long term availability of the technical data, then he could require in a contract that the technical data be placed in escrow.

Under these procedures, the Government's administrative costs to manage, verify, and store the technical data would be reduced substantially. The direct responsibility for maintaining and retrieving the data, for the most part, would be on the contractor, not the Government. Because the developing contractor will be responsible for entering into any nondisclosure agreements (based on a model agreement that would reflect accepted commercial practice) with potential Government suppliers and monitoring such agreements, he will have greater assurance that the technologies in which he has invested substantial resources for further development and marketing will not be used by a potential Government supplier for commercial purposes. The Government would become directly involved in the completion of nondisclosure agreements with potential suppliers only when the Government has taken physical possession of the data and certain limited circumstances apply. Finally, the Government also would be able to allocate its resources to better management of technical data that are necessary for form, fit, and function, operation, maintenance, repair, training of employees, etc.

These conditions of commercial use would impose a threshold determination of the contractor's interest. If the contractor's burden of meeting the conditions of commercial use, including any maintenance and retrieval activities for the purpose of exchange of the technical data with potential suppliers, exceeds the likely benefits to be derived from commercial application of the technology, then the contractor most likely would not ask for Government Purpose License Rights or would receive them with the full understanding that

the Government may disclose the related technical data to potential suppliers for Government purposes, i.e., with higher risk of disclosure.

These acquisition procedures at 227.472-2 and conditions of commercial use at 227.472-3(a)(2) would increase competition in the long term and significantly decrease the Department's procurement lead time. First, more companies would enter the contract process if, as the developing contractor, they would have access to commercially valuable technologies developed under Government contract. Increasing competition in private and Government markets will encourage contractors to take full advantage of technological opportunities, including those provided by the Government. Second, we are likely to see an increase in product availability and innovation, as companies apply technologies developed under Government contract to produce new products or enhance existing ones. Third, we should see faster and more complete delivery of technical data to potential suppliers. The exchange of technical data with potential suppliers would be a contractual obligation of the developing contractor; failure to meet that obligation could result in loss of the contractor's commercial rights and could diminish considerably the return on his investment. Also, we would eliminate the time and resources required for the Government to serve as the intermediary in the data exchange between contractors. For example, if the potential supplier receives a technical data package that appears to be incomplete or inaccurate, then he would immediately contact the developing contractor for clarification of his particular problem and avoid the otherwise elongated process of dealing through the Government. Fourth, because mere delivery of the technical data to a potential supplier is often insufficient, this approach would provide the means for the potential contractors to request directly technical assistance from the developing contractor as part of the exchange of technical data. Such technical assistance would be tailored to meet the particular needs of each potential supplier, since he would pay for any assistance costs. In sum, we would save procurement time and Government resources, would increase competition, and would enhance the effective use of technical data packages.

This approach to Government Purpose License Rights would also be useful in guiding the contracting officer during negotiation of rights to technical data developed with private and Government funds. We would therefore urge the Department to expand the potential use of Government Purpose License Rights or variations thereof to mixed funding situations.

[2] Definitions The new definitions in the rule in Section 227.471 for "developed exclusively at private expense" and "developed exclusively with Government funds" appear to limit

arbitrarily those technical data that will be considered to pertain to an item, product, or process developed at private expense. These definitions seem to thwart indirectly not only the intentions of the Executive Order, but also the requirements of the Defense Authorization Act of 1987 regarding protections for technical data developed at private expense.

[a] Definition of "Developed Exclusively at Private Expense." The Department defines "developed exclusively at private expense" as:

"in connection with an item, component, or process, that no part of the cost of development was paid for by the Government and that the development was not required as an element of performance under a Government contract or subcontract."

The Department then defines "required as an element of performance" as:

"in connection with the development of an item, component, or process, that the development was specified in a Government contract or subcontract or that the development was necessary for performance of a Government contract or subcontract."

Under these definitions, the Department apparently would categorize technical data pertaining to an item, component, or process developed by the contractor solely with his resources as Government funded, as long as that item, component, or process was in any way necessary to complete the tasks defined by a contract or subcontract.

These definitions do not appear to contribute to the achievement of any of the objectives identified previously. The Department's approach clearly will not encourage a contractor to spend his scarce resources to improve performance under a contract or to provide his superior product to meet the requirements of a contract if, as these definitions seem to imply, we intend to deny that contractor the proprietary rights to that technology. The objective of a technical data rights regulation should not be to limit wherever possible those technical data to which the contractor can claim proprietary rights, especially when the such an approach will seriously erode the competitive and technology base available to the Department.

We propose an alternative definition of "exclusively at private expense," which would meet the objectives of a technical data regulation:

"Exclusively at Private Expense" as used in this subpart

means that any of the direct costs of development of the item, component, identifiable subpart thereof, or process in which the technical data are embodied has not been paid in whole or in part by the Government. Government-sponsored independent research and development and bid and proposal costs are not to be considered Government funds. Payments to the contractor for indirect costs incurred under a Government contract are not to be considered Government funds when the direct costs of developing the item, component, identifiable subpart thereof, or process in which the technical data are embodied has not been exclusively funded by the Government."

[b] "Developed Exclusively with Government Funds." The Department defines "developed exclusively with Government funds" as:

"in connection with an item, component, or process, that the cost of development was directly paid for in whole by the Government or that the development was required as an element of performance under a Government contract or subcontract."

By applying two mutually exclusive tests--(1) paid for in whole by the Government or (2) required as an element of performance, the Department could claim unlimited rights to technical data even if the Government played a minor role in the development of the item, component, or process. For example, under the Department's definition, if the development of an item, component, or process was required as an element of performance under a contract, then the Department would claim that the technical data pertaining to the item, component, or process were "exclusively Government funded" even when the contractor provides 99 percent of the development funds.

Furthermore, under this definition together with the definition of "required as an element of performance," the Department could obtain unlimited rights in any technical data, regardless of the mix of funding, as long as the development of the item, component, or process was necessary for the performance of the contract. Consequently, if a contractor develops an item solely using his resources and the item was used in the development of a product for the Government, then the technical data pertaining to the contractor's proprietary item will revert to the Government as unlimited rights data.

The Department's claim of unlimited rights for such technical data will seriously reduce the contractor's incentive to make available to the Government his state-of-the-art technology or to use substantial resources to further develop a product

under a Government contract. The opportunity costs of such a program will be incurred by the Department of Defense, as losses in the competitive and technological base.

We urge the Department to consider an alternative definition of "developed exclusively with Government funds," which would avoid would avoid these costs:

"Developed Exclusively with Government Funds," as used in this subpart, means that the direct costs of development of the item, component, identifiable subpart thereof, or process have been paid in whole by the Government and that such development was specified as an element of performance under a Government contract."

[3] Redundancy and Burden of the Notification Requirements in Sections 227.472-3 and 227.473-1. The Department's rule appears to require at least four separate documents from the contractor or subcontractor regarding the identification of rights in technical data: (a) a "preaward notification" (227.473-1(a)(2)) to identify products or processes that would result in delivery of technical data to the Government with other than unlimited rights; (b) "continual postaward notification" (227.473-1(a)(3)) during performance of the contract prior to committing to the use of a privately developed product; (c) a "certification" (227.473-1(a)(4)) to accompany any response to a solicitation and the notifications of (a) and (b), which is to provide an identification of the contract under which the technical data are or were delivered, the expiration date and limitation on the Government's use, and an authorization for the contracting officer to request additional information to evaluate the assertions; and (d) a "listing" (227.472-3) of technical data delivered with other than unlimited rights as required by the clause at 252.227-7013.

The Paperwork Reduction Act of 1980 as amended (44 U.S.C. Chapter 35) and its implementing regulations at 5 CFR 1320 require that any collection of information from the public cannot be duplicative with any other collection by the Federal Government and that such collections of information must be the least burdensome necessary to meet the Federal agencies clearly identified needs. The notification requirements in the Department's rule do not appear to meet either of these requirements. We recommend that the Department simplify the notification procedures to eliminate the redundancy and reduce the burden.

The listing requirement in Section 227.472-3 and the clause at 252.227-7013 raises other concerns as well. According to the Department's rule, if the contractor mistakenly does not include in this listing technical data pertaining to a

privately developed product, then the Government will claim unlimited rights to those data. Apparently, the Government will claim such rights even if the contractor has legitimately stamped "limited rights" on the technical data package simply because the contractor failed to include the data on the list. This provision is completely alien to the objectives of a technical data rights regulation and may be contrary to the express provisions in the law. With this requirement, the Department seems to be attempting to catch the contractor or subcontractor with an incomplete list and thereby claim unwarranted rights to technical data. The added risk associated with this listing certainly will not encourage contractors to make their state-of-the-art technologies available to the Government and will most likely discourage further development and innovation of technologies developed under Government contract. Further, the added risk provides no new information to the Government, since the list appears to be redundant with the three other notification requirements in the rule.

We would therefore urge that you consider a streamlined approach that will meet the Government's need for information at considerably less cost to the contractor or subcontractor:

227.473-1 Procedures for establishing rights in technical data

(a) Notification. When the technical data pertain to an item, component, identifiable subpart thereof, or process developed exclusively with Government funds, the Government, in accordance with 227.472-3(a)(2), will obtain Government Purpose License Rights for the time specified in an agreement with the contractor or subcontractor. When technical data developed exclusively at private expense are to be used in a Government contract, the contractor or subcontractor, to the maximum practicable extent, should declare the use of such data before the contract is awarded.

(i) If delivery of technical data developed at private expense is expected under a Government contract, the provision at 252.227-7035, "Notification of Limited Rights in Technical Data," shall be included in the solicitation. Under this provision, offerors are required to identify to the maximum practicable extent the use of the items, components, identifiable subparts thereof, processes, or computer software that would result in technical data to be delivered to the Government with limited rights.

(ii) Any technical data delivered to the Government with limited rights must be identified in a contract prior to the delivery of the technical data to the Government. This is necessary for the Government to make informed

judgments concerning the life-cycle costs of alternative means of achieving competitive procurement of items, components, processes, subparts, or computer software and to ensure Government protection of technical data developed exclusively at private expense.

(iii) The Government may challenge in a timely manner in accordance with 227.473-4 assertions by the contractor or subcontractor that the technical data are developed exclusively at private expense.

(b) Identification of restrictions on Government rights.

(i) The clause at 252.227-7035 requires offerors and contractors to notify the Government of any restrictions or potential restrictions on the Government's right to use or disclose technical data pertaining to an item, component, identifiable subpart, process, or computer software that are required to be delivered under the contract. This notice advises the Government of the contractor's or any subcontractors' intended use of the items, components, processes, subparts, and computer software that are required to be delivered under the contract and that: (1) have been developed exclusively at private expense (see 227.472-3(b)); and (2) embody technology that the contractor or subcontractor intends to commercialize (see (227.472-3(a))).

(c) Certification of Intent to Commercialize or to Use Items, Components, Subparts, Processes, or Computer Software Developed with Government Funds. In accordance with 227.472-3, the developing contractor or subcontractor must provide within a reasonable period of time written certification of its intent to commercialize the technology embodied in items, components, subparts thereof, processes, or computer software that have been developed exclusively with Government funds.

(d) Establishing rights in technical data. After receipt of a contractor's or subcontractor's notifications and certifications in accordance with (a), (b), and (c) the contracting officer, when the requirements of 227.472-2 have been met, should enter into agreements establishing the respective rights of the parties in the technical data pertaining to any item, component, identifiable subpart, process, or computer software so identified. The respective rights shall be based on a consideration of the requirements and standard rights as provided in Section 227.472-3 and on negotiations pursuant to 227.472-2 and 227.473-1 and shall be documented to the maximum practicable extent in written agreements made part of the contract. These

agreements should be established prior to the contractor's or subcontractor's commitment to use the item, component, identifiable subpart, process, or computer software, but must be established no later than delivery of the technical data or computer software to the Government. Before agreeing to include any description of rights in technical data pertaining to any item, component, process, subpart, or computer software in the agreement, the contracting officer should assess the reasonableness of the contractor's or subcontractor's assertion and in accordance with the requirements of 227.472-2 consider the likely impacts of such assertion on the Government's needs. After such an evaluation the contracting officer may:

(i) concur with the contractor's assertion and conclude the agreement;

(ii) if the contracting officer has evidence of reasonable doubt about the current validity of the offeror's assertion, submit to the offeror a written request, which includes documentation of the evidence of reasonable doubt, to furnish evidence of such the assertion; or

(iii) if the requirements of 227.472-2 have been met and the acquisition of technical data or rights to technical data is necessary, enter into negotiations with the contractor to establish the respective rights of the parties in the technical data or computer software.

[4] Redundancy of Section 227.473-1(b)(2)(i)(B). This Section in the Department's rule indicates that the contracting officer will not negotiate Government Purpose License Rights if the technical data are needed for immediate competition and protection of the contractor's rights would be "unduly burdensome on the Government."

The application of the first test--needed for immediate competition--is unclear, since the definition of "immediate" is not provided in the rule. It is difficult to imagine a competition that is needed before a contract with the developing contractor is signed by the respective parties. Since the procedures under which the developing contractor would exchange any technical data in which he has a commercial interest should be specified in a contract in the early stages of development, the application of the first test would seem to be a very rare event. This apparently narrow construction is fortunate, if correct, because any other interpretation of "immediate" would seem to unnecessarily discard opportunities for commercial use of technologies developed under Government contract and, hence, result in losses of technologically advanced defense products

for the Government.

The contracting officer will also lack guidance on the application of the second test--unduly burdensome, which also lacks definition in the Department's rule. We would suggest that the rule include guidance to the contracting officer in accordance with the acquisition procedures we provide at item [1][a]. This will clearly articulate the evaluation process that the contracting officer should follow in determining when negotiation is appropriate. Thus, this Section could be eliminated and a reference to our proposed 227.472-2 provided in its place.

[5] Clauses and Reporting Requirements. We would also urge that the Department review and simplify wherever possible the reporting requirements in the rule. In accordance with the Paperwork Reduction Act, information collections in Federal agency regulations must be necessary, must be the least burdensome means to meet the agency's need, and cannot be duplicative with any other Federal collection of information.

Case Management Record

Info
EXOC SEC

DAR Case No. 87303	CAAC No.	Original Updated	Date 6/23/88
Title Technical Data			
Reference			
Synopsis Additional Public Comment			
Priority	Submitted By	Originator Code	Case Manager
Keywords			
Case References			
FAR Cites			
DFARS Cites			
Cognizant Committees			
Recommendation TASK TO Committee			
Notes			



Office of the Controller
Grants and Contracts Department
U-151, Room 114
343 Mansfield Road
Storrs, Connecticut 06268
(203) 486-4436, 486-4437

May 24, 1988

Mr. Charles W. Lloyd
Executive Secretary
ODASD (P) DARS
c/o OASD (PL) (MRS)
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Ref: DAR Case 87-303

Dear Mr. Lloyd:

The University of Connecticut wishes to submit the following comments with respect to the interim rule published at 53 FR 10780 under the DFARS Subpart 227.4 - Technical Data, Other Data, Computer Software, and Copyrights and the clause at 227.252-7013.

Our position with respect to data rights on federally funded research is summarized below, followed by our recommended revisions to the interim rule.

UNIVERSITY POSITION

Public Law 96-517, as amended, by giving nonprofit organizations and small businesses the right to own and commercialize patentable inventions resulting from federally funded research grants and contracts, has facilitated stronger research relationships and technology transfer between universities and industry.

University technology, however, involves not only patentable inventions but technical data and software. The absence of a federal policy for technical data and software which parallels that for patentable inventions is a substantial disincentive blocking the effective commercialization of many technologies by U.S. industry.

The University of Connecticut position was presented by COGR representatives in testimony presented on April 30, 1987, before the House Subcommittee on Science, Research and Technology. That testimony strongly endorsed Section 1(b)(6) of the April 10, 1987, Executive Order, "Facilitating Technology Transfer" and is included as Attachment 1.



An Equal Opportunity Employer



Georgia Institute of Technology
Atlanta, Georgia 30332-0420

GEORGIA TECH 1885-1985

DESIGNING TOMORROW TODAY

J. W. Dees, Director
Office of Contract Administration
(404) 894-4810

3 June 1988

Mr. Lloyd:

Attached is a corrected version of my May 30, 1988 letter. The word "universities" has been inserted in line 7 of the first paragraph and the word "no" has been corrected to read "not" in the sixth line of the third paragraph.

Sincerely,
J.W. Dees



GEORGIA TECH 1885-1985

DESIGNING TOMORROW TODAY

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May 30, 1988

Mr. Charles W. Lloyd
Executive Secretary
ODASD(P)DARS
c/o OASD(PL)(MRS)
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Ref: DAR Case 87-303

Dear Mr. Lloyd:

This letter is submitted in support of the position of the Council on Governmental Relations in their 11 May 1988 letter on the above referenced matter. Georgia Tech, as both a major research university in the area of information technology and developer of computer software which has been successfully commercialized, urges the implementation of a Federal policy on computer software and data which parallels that contained in Public Law 96-517. P.L. 96-517 has facilitated stronger research relationships between research universities and industry. This benefit should be expanded across the broad spectrum of intellectual property.

As was pointed out in testimony given on by M.I.T.'s George H. Dummer on 30 April 1987 before the U.S. House of Representatives Committee on Science, Space and Technology, Subcommittee on Science, Research and Technology, the effective transfer of university generated technology requires the consideration of different (trade secret, patent, copyright) intellectual property rights. Technology can no longer be cleanly categorized as only having one kind of right subsisting within it.

Georgia Tech is one of many universities facing this issue. The technology developed in university laboratories under Federal sponsorship comprises only the starting point for technological innovations which are a necessary part of our maintaining our position in the worldwide scientific community. A progressive, consistent set of Federal policies in the area of intellectual property ownership and rights would have a positive effect which would benefit not only universities, but the nation as well.

We would be pleased to provide additional information at your convenience.

Sincerely

Georgia Institute of Technology

By: J. W. Dees, Director

Office of Contract Administration

cc: Milt Goldberg, Executive Director
COGR



United Technologies Building
Hartford, Connecticut 06101
203/728-6255

Joel W. Marsh
Director
Government Issues

May 31, 1988

Mr. Charles W. Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
ODASD(P)/DARS
c/o OUSD(A) (M&RS)
Room 3D139
The Pentagon
Washington, DC 20301-3062

Dear Mr. Lloyd:

United Technologies Corporation (UTC) appreciates the opportunity to comment on the Department of Defense Federal Acquisition Regulation Supplement; Patents, Data and Copyrights (DAR Case 87-303).

UTC has supported the joint efforts of the Department of Defense (DoD), Department of Energy, National Aeronautics and Space Administration, and Office of Management and Budget/Office of Federal Procurement Policy to develop a regulation that balanced the interests of government and industry based on the President's Policy on Science and Technology, the recommendation of the Packard Commission on Technology, and the will of the Congress as expressed in Public Laws 99-661 and 100-180. Consequently, we were surprised that the interim regulation bears so little resemblance to the proposed approach by the joint agencies.

UTC has also supported the Aerospace Industries Association (AIA) task force which worked with the Council of Defense and Space Industries Association (CODSIA) in developing a composite industry response to this interim regulation. This response provides specific comments on issues which, if incorporated, could improve the interim regulation as currently structured. We wholeheartedly support these recommended improvements and will be available to further assist AIA/CODSIA in supporting your efforts to develop a more equitable final regulation.

Aside from the details provided in the AIA/CODSIA response, we encourage you to focus your attention on what appears to be an inherent philosophical difference in what the DAR Council intends to achieve through the interim regulation and the objectives of the President's Policy on Science and Technology, the Packard Commission's recommendation on Technology, and the Congress as stated in Public Laws 99-661 and 100-180. Although the wording of the regulation is very complex, it would appear that the DAR Council has placed the Government's need for unlimited rights in technical data for competitive reprocurement purposes as the overall and primary objective of the regulation. Any "balancing"

of interests of government and industry in technical data appears to be secondary to that overall objective. The following two points will illustrate: first, data not included in a contract listing is automatically defined as "unlimited rights"; and second, the expansive definition of "required in the performance of a contract" will involve background manufacturing and design technology never before considered as developmental work required under contract. Both will cause forfeiture of valuable property rights and represent radical departures from past regulatory requirements.

In addition, the interim regulation will be unwieldy. The opportunity provided in the regulation for industry to utilize and protect privately developed technology, for example, is administratively burdensome, will necessitate extensive paperwork, and will require systems not currently in existence. Moreover, the approach also appears threatening in today's litigious environment due to the liberal use of the "notification" and "certification" requirements.

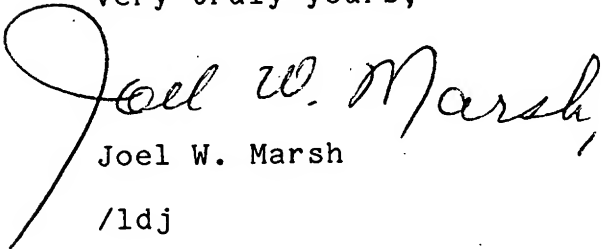
The concepts of "list or lose" and "development necessary for performance of a government contract or subcontract" are very broad and do not encourage risk taking on the part of industry to incorporate new or emerging technologies into DoD products. The expanded requirements for paperwork development, paperwork retention, "notification", and "certification" as a part of the bid/proposal process for new contracts will discourage the aggressive use of privately developed technology in defense products. This is especially true when it is recognized that sustaining a successful claim of "limited rights" will be expensive, time consuming and treacherous since a successful claim would be undesirable and inconsistent with the overall objective of the interim regulation.

UTC believes the regulation needs extensive revision without the overwhelming bias in favor of unlimited rights in all categories of data. These revisions could be enhanced through an understanding of the types of technical data and the needs of the government in these data. We believe the issue of rights in technical data is minimal in connection with providing technical data for training, operation, maintenance, overhaul, and repair. We believe that the substance of the technical data issue lies in the area of competitive procurement data. However, the "cast net" approach of the interim regulation in obtaining technical data for government needs fails to recognize the broad range in types of data and industry's willingness and ability to satisfy much of the government's needs in this data. Instead, this

approach focuses extraordinary emphasis on the government's need for unlimited rights in competitive reprocurment data. We believe that the issue could be brought to a more satisfactory conclusion by a joint government/industry effort with the specific assignment of satisfying the technical data requirements as mandated by the Executive Branch and in Public Laws.

UTC appreciates the opportunity to comment on this interim regulation. We support any effort that the DAR Council might undertake to work with industry in developing a final regulation that reflects an understanding of technical data issues in an effort to provide a balance between the interests of the parties. If UTC can be of assistance to the DAR Council in developing the final regulation, please feel free to call upon us.

Very truly yours,


Joel W. Marsh

/ldj

UNIVERSITY OF
ROCHESTER

OFFICE OF RESEARCH &
PROJECT ADMINISTRATION

31 May 1988

Mr. Charles W. Lloyd
Executive Secretary
ODASD(P)DARS
c/o OASD(PL)(MRS)
Room 3D139, The Pentagon
Washington, DC 20301-3062

Subject: DAR Case 87-303

Dear Mr. Lloyd:

The University of Rochester offers the following comments to the interim rule published at 53 FR 10780 under the DFARS Subpart 227.4 - Technical Data, Other Data, Computer Software, and Copyrights. Rochester's sponsored research base this year is approximately \$110 million and represents research for a broad range of disciplines including the School of Medicine and Dentistry, College of Engineering and Applied Sciences, and the School of Arts and Sciences. Rochester has successfully engaged in technology transfer, has an established technology transfer program and has been recognized by industry as having developed technology suitable for development and commercialization by corporations.

Public Law 96-517, as amended, by giving nonprofit organizations and small business the right to own, develop, and commercialize patentable inventions resulting from federally funded research grants and contracts, has facilitated strong research relationships and technology transfer between universities and industry. Since the enactment of this public law, corporate sponsorship has increased by approximately 52% at Rochester. This can be attributed, in part, to the enactment of this law. We also recognize that university-generated technology requires licensing and administration of a combination of intellectual property rights. At Rochester we are researching and developing nuclear magnetic resonance imaging devices that require integrated hardware and software systems, integrated circuits, and chip designs that include or could include a combination of intellectual property rights. The proposed interim rule does not parallel the existing federal policy for patents and technology transfer and consequently will not encourage and will, in fact, make it more difficult to transfer university technology for commercial development.

Section 227.472, "Acquisition policy for technical data and rights in technical data", indicates that only the government can fulfill its obligations of technology transfer and fails to recognize the valuable role that universities have in the dissemination of research results. We recommend under 227.472 -1(b) and 1(c) that language is added that recognizes the contribution of universities and their technology transfer programs.

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Rochester, New York 14627
(716) 275-5373

Sections 227.472-2 and 227.472-3 (a)(1) is reminiscent of pre-Public Law 96-517 when the government needed to be petitioned by contractors for extended rights to patents. Prior to Public Law 96-517 commercial corporations were not encouraged, guaranteed, nor was the process made easy for universities to collaborate with industry in the transfer of technology. This section will have the same affect on universities and industry. Universities' ability to transfer technical data and software to industry will severely inhibit the strength and vitality of its interactions and technology transfer with industry. The mere existence of the government's unlimited rights, whether exercised or not, will severely limit the transfer and commercialization of technology developed at universities. When one couples this proposed section with the preponderance of new federal grant programs that encourage and require university and industrial interaction and commercialization research activities, one finds that they are at diametric ends. We recommend that government rights should be limited to data in which the government has a need and which cannot be supplied by other means or which is specifically required to be delivered under the terms of the contract. This would effect the transfer of technical data and computer software to both the government and commercial concerns in the same processes and benefits as is required for patentable technology.

In addition to the above recommended changes Rochester recommends that section 227.472-3(a)(2)(ii)(B) be omitted. Publication of research results is a priority of every university; publications, however, are sometimes jointly made with the commercial development of technical data and computer software. The government should not acquire unlimited rights to this data unless it is required as part of the statement of work and the Government should accept GPLR when a small business or nonprofit organization agrees to commercialize the technology.

University technical data and computer software is usually a cumulative result of many years of research and effort with a multitude of sponsors, (i.e. university, federal, foundation, and corporate). Section 227.473-1(b)(2) should be augmented to provide guidance to contracting officers when technical data and computer software accrues from universities and other nonprofits. The government should only be able to acquire GPLR if it does not need to use the data for competition and the university or other nonprofit is interested in commercializing the data.


As discussed above it is very difficult to modify federal regulations for basic research performed at universities. Competitive procurement of items, components, parts and processes usually does not occur at universities. As in recent regulations, i.e. patent regulations, universities were combined with the Small Business Innovative Research Program (SIBR). As an alternative to extensive language modification, Rochester recommends that the SIBR rights in technical data and computer software be modified to include universities and other nonprofits.

Mr. Charles W. Lloyd
Re: DAR Case 87-303

31 May 1988
Page 3

Thank you for the opportunity for the University of Rochester to comment on such important and far reaching regulations for universities and the ultimate transfer of technology to corporations for commercialization.

Sincerely,



Jane A. Youngers
Director

Aeroquip Corporation
Aerospace Division
Jackson Plant
300 South East Avenue
Jackson, MI 49203-1972
Phone: 517-787-8121
Telex: 223412
TWX: 810-253-1947

87-303



May 31, 1988

Defense Acquisition Regulatory Council
The Pentagon
Washington, DC 20301-3062

Attention: Mr. Charles W. Lloyd
Executive Secretary
CDASP (P) DARS c/o OASD (P&L) (MRS)
DAR Case 87-303


Dear Mr. Lloyd:

Aeroquip has reviewed the DAR Council interim changes to Subpart 227.4 and Part 252 of DFARS as published in the Federal Register on April 1, 1988. Aeroquip does not support the proposed changes.

Aeroquip does endorse the comments submitted to you by the Proprietary Industries Association pursuant to the 60 day public comment period. We believe these comments deal fairly with innovative aerospace sub-contractors.

Should additional information be required, please contact the undersigned.

Very truly yours,


Larry Barnhart
Marketing Manager
Product Development

LB:tr

cc: Bettie S. McCarthy
Government Relations Consultant
733 15th Street, NW, Suite 700
Washington, DC 20005

Proprietary Industries Association
220 No. Glendale Ave. Suite 42-43
Glendale, CA 91206
Attention: H. (Bud) Hill Jr., Counsel

Mark A. Conrad
Vice President -
Secretary and General Counsel
Aeroquip Corporation
300 S. East Avenue
Jackson, MI 49203

Case Management Record

DAR Case No. 87-303	CAAC No.	Original Updated	Date	
Title Tuck Watu				
Reference				
Synopsis Add'l Pub Cmts				
Priority	Submitted By	Originator Code	Case Manager	
Keywords				
Case References				
FAR Cites				
DFARS Cites				
Cognizant Committees	TD			
Recommendation				
Notes				

Case Management Record

EXOC SOC
- INFO -
6/27/88

DAR Case No. 87-303		CAAC No.		Original Updated	Date 6/27/88
Title TECH DATA					
Reference					
Synopsis Additional Public Comment					
Priority	Submitted By	Originator Code		Case Manager	
Keywords					
Case References					
FAR Cites					
DFARS Cites					
Cognizant Committees					
Recommendation Assign to Tech Data Comm					
Notes					

87-303

JUN 22 1988

Honorable Robert B. Costello
Under Secretary of Defense
for Acquisition
Department of Defense
The Pentagon - Room 3E808
Washington, DC 20301-1000

Dear Dr. Costello:

We have completed our review of the interim regulation entitled, "Patents, Data, and Copyrights," published in the Federal Register on April 1, 1988. We appreciate your efforts to respond to the issues raised in our letter of February 29, 1988 on an earlier draft of the rule. Also, discussions with your staff have proven most helpful in allaying some of our concerns, particularly with regard to your intentions on the treatment of data rights for items developed solely or predominantly with contractor resources. While I expect that this issue and others raised in this letter will be satisfactorily resolved in the final rule, these comments can, of course, only address the regulation as published. I am concerned that a number of provisions of this interim rule do not appear to meet the President's technology transfer objectives and will not support the Department's goal of achieving cost-effective procurements. In addition, several of the provisions in the final rule do not appear to meet the requirements of the Paperwork Reduction Act and its implementing regulations, which specify that a collection of information: (1) must be necessary to perform the agency's functions, (2) must be the least burdensome method of meeting the agency's need, and (3) must not be duplicative with any other collection by the Federal Government. These concerns are described in detail in the Enclosure.

We have all become increasingly concerned about the impact of changes in procurement statutes, policies, and regulations on the defense industrial base. Clearly the quality and capacity of that base, and our ability to meet future defense needs, must be ensured to achieve the level of national security we demand. The determination of rights in technical data developed using private or Government resources will be a key determinant of our success in this regard.

Our ability to leverage the Government's investment in product development will be influenced significantly by the Department's procedures to protect from release or disclosure

technical data pertaining to a product developed at private expense and to encourage commercialization of Government funded technologies. Since the Department's regulatory procedures on rights in technical data will affect the expected rate of return on initial or subsequent contractor investment, the contractors' incentives for product innovation and their willingness to provide high quality products for the defense market also will be influenced by these regulations.

For any contractor to invest scarce resources in the initial or further development of a technology, he must be assured of a reasonable return on that investment. The potential for disclosure of technical data to potential competitors, and the Government's discretionary control of that disclosure, will increase the risk associated with any investment and possibly reduce the incentives for the contractor to absorb that risk.

Technical data represent special types of commodities with unique problems, in that disclosure of these data can generally be accomplished very easily and, once disclosed, the commercial value of the technology is significantly diminished. Thus, to provide the necessary incentives to develop and market new technologies, the Government must be especially attentive to the need to manage effectively our demand for, and access to, technical data and provide the appropriate protections from disclosure regardless of the source of funding for the data.

If, through Government disclosure of the technical data, a competitor can replicate the technology, then the contractor who spends his scarce resources to develop the original product or enhance significantly an existing product is at risk of being unable to recoup the full costs of development, let alone obtain a reasonable return on that investment. If the Department, through its technical data regulation, unnecessarily imposes additional risk of disclosure and, thereby, reduces the expected return on the contractor's investment in product development, which is frequently far in excess of the initial research investment, then the contractor's incentive to make that investment will be reduced. More importantly, the contractor may decide not to sell in the defense market or to sell the Department second or third best technologies.

We also strive to achieve effective competition. To obtain competition among suppliers for a product or process developed using Government funds, a potential Government contractor may need to have access to technical data pertaining to that product or process. Again, however, we must be particularly careful not to unilaterally acquire and

disclose technical data developed using Government or private funds only to lose opportunities to purchase the best technologies to meet our defense needs and significantly enhance competition in the long term.

Similarly, we can enhance the competitive base through our regulatory policies if we specifically and emphatically endorse contractor innovation. Competition can be effectively stimulated by providing the necessary incentives for the contractor to take full commercial advantage of our technologies, not only to increase the ability of domestic industries to compete internationally, but also to meet our defense needs more effectively. To this end, contractors should be given strong incentives to develop new products and improve existing products developed under Government contract.

The opportunity costs of lost innovation or reduced competition are easy to ignore, since regulations that discourage technological innovation will not be recognized in the acquisition system for some time. However, if we concern ourselves only with immediate and seemingly more pressing needs, then we risk losing in the longer term our defense readiness and technological advantage.

We must recognize that a technical data rights regulation that will maintain or, where necessary and possible, enhance the defense industrial base may have short term costs. The contractor who develops a superior product or process will realize a higher profit in the short term relative to his competitors. Thus, for a period of time, the inventor's and the Government's interests may appear to diverge. However, the protection of the contractor's economic interest is absolutely essential to encourage the contractor to invest in the development of the product or process in the first place. If the contractor cannot be assured of keeping the invention secret at least for a time, then he will not invest and the Government will not have access to the technology. Therefore, effective protection of technical data, regardless of the source of funding, is in the Government's best interest.

The Department seems to recognize these concerns. In the general policy statement, the Department indicates that it will obtain only the minimum essential technical data and data rights and will do so in a manner that is least intrusive to the contractor's economic interests. However, the rule lacks the essential ingredient to implement that policy--the procedures that the contracting officer must use to determine what technical data the Department specifically needs and how to meet those needs in a manner that is least damaging to the contractor's economic interest. In our

February 1988 letter, we urged the Department to include such procedures in the final rule. We continue to view these procedures as absolutely essential to ensure that the Department will have access to advanced technologies to meet our defense needs and that it can meet those needs in a cost-effective manner. We recommend that the Department include such technical data acquisition procedures in the rule. These technical data acquisition procedures would then complement the existing requirements at 217.72, which specifically direct the contracting officer, presumably after consultation with the other members of the project team, to "decide whether to procure data for future competitive acquisition" in accordance with the provisions of Part 227. If it is considered inappropriate to include such procedures in the rule, at a minimum, they should be identified with a Departmental Directive or Instruction, and specifically referenced in the rule. Our clear preference, however, is for these procedures to be included in the rule itself.

We recognize the Department's concern that future competition may be held hostage to a critical element that the contractor chooses to develop at private expense. But we should be especially careful not to threaten a contractor's legitimate proprietary technology to eliminate such a possibility. We have serious concerns that the new definitions in Section 227.471 of "developed exclusively at private expense" and "developed exclusively with Government funds" will not provide the protections from disclosure that are necessary to encourage contractors to sell their proprietary products to the Government and will not promote private resource investment in the development of defense technologies. The classification of technical data as "developed exclusively at private expense" or "developed exclusively with Government funds" is contingent on whether the item, component, or process to which the data pertain is "required as an element of performance under a Government contract or subcontract," or, as this is defined in the rule, "development was specified in a Government contract or subcontract or that the development was necessary for performance of a Government contract or subcontract." Under the Department's rule, for example, the definition of "developed exclusively with Government funds" will apply to all technical data pertaining to an item, component, or process when its development is necessary for the performance of a contract, even if it was developed solely or predominantly with contractor resources. The Department can then claim "unlimited rights" in those technical data, which includes the "rights to use, duplicate, release, or disclose...in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so." Thus, technical data pertaining to proprietary products or products in which the contractor has invested substantial resources will not be protected. This indirect

means of obtaining "unlimited rights" to what would logically be considered proprietary technical data does not appear to respond to the requirements of the Defense Authorization Act of 1987 or the draft policy developed in accordance with Executive Order 12591. Moreover, I do not believe that it is your intent to acquire unlimited rights in this manner. I recommend that in the definition of "required as an element of performance" the Department delete the reference to "development was necessary for performance of a Government contract or subcontract," to eliminate any uncertainty about how the definition would be applied.

Several of the requirements appear to be largely redundant and, hence, inconsistent with the requirements of the Paperwork Reduction Act and its implementing regulations and the Department's regulatory simplification objectives. The absence of a link between the notification requirements in Section 227.473-1 and the listing requirement in Section 227.472-3(a) is particularly confusing. For example, the Department's rule appears to require at least four documents from the contractor that identify the rights in technical data: (1) a "preaward notification" (227.473-1(a)(2)) to identify products or processes that would result in the delivery of technical data to the Government with other than unlimited rights; (2) "continual postaward notification" (227.473-1(a)(3)) to continue notification during performance of the contract; (3) a "certification" (227.473-1(a)(4)) to identify the contract under which the data are or were delivered, the expiration date and limitation on the Government's use, and an authorization for the contracting officer to request additional information to evaluate the assertions; and (4) a "listing" (227.472-3(a)) of technical data delivered to the Government with other than unlimited rights. These requirements, as drafted, appear to be duplicative and, hence, do not provide the least burdensome means to achieve the Department's objectives. If the rule is not referencing four distinct lists but rather one list that may be updated at different times, then an easy way to clarify this would be to provide a descriptive name for the list, and refer to this same list throughout the rule. In any regard, we recommend that the Department reduce the notification procedures to one set of consistent, nonduplicative requirements for identification of rights in technical data.

The listing requirement raises other concerns as well. Under the Department's rule, for example, if a contractor fails to include in the list technical data pertaining to a privately developed product, then the Government will claim "unlimited rights" to such data. Failure to include proprietary data on a listing should not serve as a means for the Government to obtain "unlimited rights" to privately developed

technologies. The Department has other provisions in the rule that will meet its needs for identification, notification, and verification while protecting the contractor's property and economic interest. Unfortunately the listing requirement at 227.472-3(a) appears to be a "gotcha" provision with no further attempts by the Government to clarify rights in the technical data, particularly when the data are marked in a manner that is inconsistent with the listing. We recommend that the Department reconsider the use of listing requirements in Section 227.472-3(a) as a means of claiming "unlimited rights" in technical data, or at least, provide procedures in the rule to allow contractors an opportunity to correct errors in the designation of data rights.

The Department's rule indicates in Section 227.473-1(b) that the contracting officer should not negotiate Government Purpose License Rights if the technical data are needed for immediate competition and if protection of the contractor's rights would be "unduly burdensome on the Government." The application of the "immediate competition" test should be rather limited, since the negotiation with the developing contractor regarding rights in technical data should take place in the early stages of the research and development contract. It is difficult to foresee a situation, except perhaps a national emergency, in which the Government would compete a product before the development had been completed. The test of "unduly burdensome" also is undefined in the Department's rule. This test should be clarified through specific procedures regarding the acquisition of technical data or rights in technical data. Thus, the need for such procedures on how and when to acquire rights in technical data is further emphasized. We, therefore, recommend that the Department delete Section 227.473-1(b)(2)(ii)(B) of the rule and substitute a reference to the acquisition procedures as discussed above.

And, finally, I would urge that the Department review and, wherever possible, simplify the contract clauses in the rule. Since in many cases these clauses trigger activities that are covered under the Paperwork Reduction Act, we must be assured that they are the least burdensome necessary to meet the Department's specific needs. In accordance with the Department's recent request, we will provide you with some suggested changes to the clauses to meet these objectives.

I appreciate your consideration of these comments.

Sincerely,

Allan V. Burman

Allan V. Burman
Deputy Administrator and
Acting Administrator

Enclosure

Summary of the Issue

Public disclosure by the Government of technical data developed using private or Government funds can cause serious hardship to the developing contractor, reduce the commercial value of the technology, and thereby jeopardize the incentives necessary for the contractor to develop and market new technologies for the private and Government markets. Even the mere threat of public disclosure by the Government will reduce the expected return on the firm's research, development, and marketing of the technology and, consequently, will reduce the incentive for a firm to incur the often substantially greater cost to develop new products or processes for military and commercial markets.

In a recent paper published by the National Bureau of Economic Research, these characteristics of technological innovation were highlighted:

"The new knowledge or innovation may be a cost-reducing process, a product, or some combination of the two. The knowledge-producing firm earns a return either through net revenues from the sale of its own output embodying the new knowledge or by license and nonmonetary returns collected from other firms which lease the innovation. Since the private rate of return to research depends on the present value of the revenues accruing to the sale of the knowledge produced, the conceptually appropriate rate of depreciation is the rate at which the appropriable revenues decline for the innovating firm. The rate of decay in the revenues accruing to the producer of the innovation derives not from any decay in the productivity of knowledge but rather from two related points regarding its market valuation, namely, that it is difficult to maintain the ability to appropriate the benefits from knowledge and that new innovations are developed which partly or entirely displace the original innovation." (Ariel Pakes and Mark Schankerman, "Obsolescence, Research Lags, Rate of Return to Research," in R&D, Patents, and Productivity, 1984, pp. 74-75.)

The Government, through its regulations and technical data management, will affect the rate of decay of revenues from investment in technological innovation. When, as a consequence of potential disclosure of his technology, the contractor is at-risk of being unable to recoup the full costs of development of a product or process, including a reasonable return on that investment, then the contractor will increase the expected rate of decay of potential revenues and, correspondingly, will lower the expected rate

of return on the investment. As a consequence of the diminished return, the contractor often may decide not to develop the product or process or, in an effort to limit the risk of disclosure, not to provide the product or process to the Government market at all.

Protection of technical data for a period of time, and hence protection of the economic interest of the developing contractor, is necessary to ensure that the technology can be effectively used in the development of new and improved products and processes for the private and Government markets. Protection of technical data, therefore, should not be considered merely of concern to the contractor. It should also be a high priority of the Department of Defense. In the absence of protection of technical data regardless of the source of funding, the Government will lose significant opportunities to enhance the industrial base, promote contractor investment in the continued development and production of high quality, high performance defense products, ensure Government access to these products, and provide for the long term competition necessary for cost-effective procurements.

While the Government sometimes needs technical data pertaining to items, products, or processes it procures, many of these Government needs can be effectively and efficiently met by ensuring Government access to the technical data rather than the Government's physical possession of the technical data. Physical possession of the technical data by the Government, in many cases, wastes Government resources and unnecessarily jeopardizes the commercial value of the technology. The Government can often meet its procurement needs more cost-effectively through direct licensing and nondisclosure agreements between the respective contractors.

Risk of Disclosure under the Freedom of Information Act

The risk of disclosure of the technical data is heightened by the potential for competitors to obtain valuable technical data through a Freedom of Information Act (FOIA) request. The Department of Justice in a May 1987 letter to USAF General Skantze has indicated that technical data appear to fall within the definition of "records" under the Records Disposal Act (44 U.S.C. 3301), which includes:

"books, papers, maps, photographs, machine readable materials, or other documentary materials...made or received by an agency of the United States Government under federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor...because of the informational value in them."

The Department of Justice also noted that Section 2328 of Title 10 clearly contemplated release of technical data to a person requesting such release under FOIA. Regarding the contractor's proprietary technical data, the Department advised that:

"As a threshold matter, any technical data submitted under a procurement contract containing a restriction on the rights of the United States to release or disclose could not be disclosed under the FOIA, and FOIA requests for such material can be summarily denied. The 1986 amendments to 10 U.S.C. 2320 are particularly clear on this point. Should a FOIA request be filed with respect to any technical data as to which the contractor claims proprietary rights which have not been finally determined, all appropriate challenge procedures for determining such rights under 10 U.S.C. 2321 or other applicable law or regulations should be followed in full before any such data can even be considered for disclosure pursuant to the FOIA. Thus, there is no conflict between the FOIA and the DOD procurement laws protecting contractors' proprietary rights in any technical data: to the extent that disclosure of the data is restricted by law, including during any period needed to validate the proprietary data restrictions under applicable law, the data need not (indeed cannot) be disclosed under the FOIA, and FOIA requests for such materials, accordingly, can and should be denied."

However, because the courts have viewed the statutory exemptions as basically permissive, the agency would appear to have the discretion to disclose such technical data. Consequently, the Government contractor will be continually at-risk of losing even his proprietary technology to a competitor via a FOIA request.

While the Justice Department indicates that protection of technical data pertaining to an item, component, or process developed solely by the contractor can be provided, these discretionary protections may not apply to technical data developed partly or wholly with Government funds. The courts may conclude that Government contracts that permit the contractor to retain such technical data for exclusive commercial use are not sufficient to create the potential for exemption as proprietary technical data. In which case, the Government's efforts to promote effective and more extensive use of our technologies may be completely thwarted by FOIA requests directed solely at discovery of the developing contractor's valuable technology. The Government's physical possession of the technical data, because such action creates an "agency record," could then trigger a FOIA request from a competitor and the commercial value of the technology will be diminished.

Research by Thomas Susman indicates that contractors do and should seriously consider the possibility of disclosure of technical data under FOIA. He also notes that the added risk of such disclosures ultimately damages the Government:

'What little empirical data there are on the impact of the FOIA on government contractors are quite disturbing. In the late 1970s an author surveyed major Air Force contractors and procurement officers and concluded: "Some of the major aerospace contractors are withholding state-of-the-art technology from their proposals to prevent release via the Freedom of Information Act." Similarly, a series of interviews with high technology firms in the Boston area revealed that "several firms did cite the fear of losing proprietary technical information as a primary factor in their decisions not to compete for government-contract work." ("Risky Business: Protecting Government Contract Information Under the Freedom of Information Act," Public Contract Law Journal, 1986, p. 19.)

While Susman acknowledges the potential for withholding confidential commercial information under Exemption 4 of the Act, he also notes that meeting the requirements of this exemption is often difficult and acceptance by the courts of this exemption for technical data is not assured. He states that:

"Counsel advising a government contractor on the possible risk of later disclosure of information provided to an agency will thus seldom be able to give a firm opinion on whether specific data will definitely be withheld from disclosure. (That agreements with agency personnel over the confidentiality of information are not enforceable only exacerbates the situation.) Unfortunately, not only is the substantive application of the fourth exemption to contractor information unsettled, but the procedures surrounding how agencies and courts make those determinations are equally unsettled...no matter how careful the contractor, submitting sensitive commercial information to the government remains risky business." (pp. 22, 27)

The Government can successfully reduce the additional risk that FOIA implies for technological innovation by severely limiting the technical data physically acquired by the Government. The Government can often successfully meet its needs by ensuring access to the necessary technical data through direct licensing or nondisclosure agreements between the respective contractors as opposed to Government possession and subsequent distribution of the data.

Some Benefits of Protection and Transfer of Technical Data

If the Department is to have access to state-of-the-art technologies and increase competition, then we must provide the necessary regulatory environment for the technological investment to occur. The 1988 Economic Report of the President presented some of the reasons for protection of technical knowledge and benefits of technology transfer by the Government:

"Investment in knowledge, like other investment, depends on rights to future returns. Even in research that is publicly supported, the incentives created by property rights have powerful effects. Patent, licensing, trademark, copyright, and trade secrets laws are critical in determining the share of the returns from commercially valuable ideas and inventions to which an inventor or investor is entitled. The dramatic advance of commercial biotechnology since 1980, for example, was aided by the U.S. Supreme Court decision that microorganisms produced by genetic engineering were patentable. Federally sponsored research can benefit from the incentives created by property rights. The Patent Law Amendments of 1980 provided a uniform system for assigning title to inventions made at universities that conduct government-sponsored research. Between 1980 and 1986 cooperative ventures increased, and the number of patents issued to American academic institutions grew by 70 percent. Before these reforms, patenting such inventions was uncertain, and cooperative research ventures between private firms and universities were difficult to establish because of the complex regulations that accompanied Federal funding." (p. 184)

Similarly, Kamien and Schwartz in a 1982 study found that:

"Stories of government-sponsored research failing to reach fruition in the form of commercially available new product or process revolve around the unwillingness of firms to engage in their final development and marketing without exclusive rights. For example the unwillingness by the Department of Health, Education and Welfare to grant exclusive rights, in the form of patents, to private pharmaceutical firms retarded commercial development of an early blood test for breast and digestive tract cancer and a test-tube method for testing the effectiveness of different cancer drugs before administering them to a patient." (Market Structure and Innovation, p.17)

In a recent report on the results of Public Law 96-517, the Small Business Innovation Development Act, which gave nonprofit organizations and small businesses the right to

retain title to Federally funded inventions, the GAO noted that, while a full evaluation of the commercial consequences of the Law is premature, a significant increase in business financial interest in university research has occurred:

"Administrators at 25 universities stated that Public Law 96-517 has been significant in stimulating business sponsorship of university research, which has grown 74 percent from \$277 million in fiscal year 1980 to \$482 million in fiscal year 1985 (in constant 1982 dollars)." ("Patent Policy Recent Changes in Federal Law Considered Beneficial," April, 1987, p. 3.)

This increase in private business commitment clearly indicates that the private sector expects significant returns from the commercial application of these inventions. According to the GAO, over 900 patents were issued to universities in 1987 -- four times the number issued in 1976, the last year the statistics were collected by the Department of Commerce, and prior to implementation of regulations to permit universities to have the rights to inventions developed under Government contract. Although these data are not conclusive, they certainly suggest a resurgence of innovative effort in the university community that is strongly correlated with legislation permitting them to retain rights to inventions developed using Federal funds.

Effective transfer of Government-funded technologies to contractors and protection of the contractor's investment in further development and marketing of the technologies for a period of time will in the long term enhance competition. In a recent report, the Office of Technology Assessment (OTA) noted the significant cost savings that can accrue when technological advances widen the competitive base. For example, OTA reported that:

"One of the classic illustrations of a successful, major Government contribution to information technology R&D is in the field of satellite communications. The National Aeronautics and Space Administration...had the leading role in pioneering technological progress toward commercial development, accelerating the time frame for the introduction of this technology, influencing the structure of the U.S. domestic and international telecommunications common carrier industries, and effecting significant cost savings over the long run.

It is also interesting to note that these NASA programs likely had some important side-effects on the structure of the U.S. international satellite communications industry. Because AT&T was the only private company to have heavily invested its own funds for satellite communications R&D...it is likely that AT&T would have dominated the new international and domestic satellite

communications services industry. Instead, the NASA programs, through continuous transfer of technology to, and close interaction with, commercial firms stimulated the competition that followed the 1972 Federal Communication Commission's decision allowing open entry into the domestic satellite communications services industry." (Information Technology R&D: Critical Trends and Issues, February, 1985, pp. 30, 31.)

Federally-funded research and development also has been shown to be a factor that encourages privately-funded R&D. In about one-third of the cases studied, firms invested their own private funds into projects identified during the performance of Federally-funded R&D projects. The likelihood of such spinoffs was found to be considerably enhanced if the firm helped to formulate the ideas on which the project was based. (Mansfield, "R&D and Innovation," National Bureau of Economic Research, 1984)

This is not to suggest that transfer of technologies developed under Department of Defense contracts will result in a blizzard of new products and processes for consumer use. Indeed, the more significant and immediate beneficiary of an effective technical data regulation will be the Department of Defense.

The President's Policies

The President's policies concerning technology transfer have recognized and responded to the need for more effective and extensive technology transfer to the private sector. In the Memorandum on Patent Policy (February 1983), the President charged Federal agencies to promote the commercial use of inventions arising from Federally funded research and development. In his Competitiveness Initiative (January 1987), the President tasked Federal agencies to help commercialize non-patentable results of Federally funded research by permitting contractors to own technical data developed under Government contracts. In Executive Order 12591 (April 1987), agencies, under the guidance of the Office of Federal Procurement Policy (OFPP), were required to develop a uniform policy permitting Federal contractors to retain rights to technical data developed under Government contracts in exchange for royalty-free use by the Government. A draft OFPP policy implementing this requirement of the Executive Order was provided to the Department of Defense in October 1987, was presented to the Vice President's Task Force on Regulatory Relief in January 1988, and was provided as an attachment as "Basic Regulatory Requirements" to our February 29, 1988 letter to the Department.

The President's Blue Ribbon Commission on Defense Management (the "Packard Commission") raised serious concerns about the

Department of Defense's acquisition of rights in technical data, concerns which in many respects apply Government-wide.

- o The Commission found that contracting officers generally require delivery of technical data even when the need for the data is not identified or when there are other means to achieve the necessary competition that may be less damaging to the contractor's commercial interests and potentially less costly for the Government.
- o The Commission also concluded that the Department's lack of recognition that a mix of public and private funds in developing new militarily useful items or processes is desirable and should be encouraged has resulted in a policy that discourages private investment in such technology.

The Commission stated that the Department obtains technical data that exceed its needs, and thereby removes incentives from innovators to develop and exploit publicly funded technology for commercial use, makes publicly funded technology more readily accessible to foreign competitors, and is out of line with congressional and executive statements concerning inventions made under Government contracts.

The Packard Commission also provided recommended specific policy changes to respond to these concerns.

- o The Department, except for technical data needed for operation and maintenance, should not, as a precondition for buying the product, acquire unlimited rights in data pertaining to commercial products or products developed exclusively at private expense.

"Private expense" as defined by the Commission included funding for the development of an item, component, or process has not been reimbursed by the Government and was not required as an element of performance under a government contract. "Private expense," according to the Commission, should include IR&D and B&P funds, even if reimbursed by the Government.

- o If the Department seeks additional rights in order to establish competitive sources, it should acquire these rights in the least intrusive manner possible, e.g., directed licensing.
- o The Government should be prohibited from acquiring technical data rights pertaining to commercial

products except those technical data, or rights in data, necessary for operation or maintenance of an item, component, or process purchased by the Government.

- o Where significant private funding was provided in a mixed funding case, the developer should be entitled to ownership of the resulting data subject to a license permitting use internally and use by contractors on behalf of the Government. If the Government provides a significant portion of funding, the license should be on a royalty-free basis. In other cases, the Government's use should be provided on a reduced or fair-royalty basis.
- o If the products are developed exclusively with Government funding, the developing contractor should be permitted to retain proprietary position in those data not required to be delivered under contract or, if delivered, not needed by the Government for competition, publication, or other public release.

Objectives of the Regulations

In accordance with these concerns and policies, for the purposes of assessment of the Department's regulation, we have identified five critical objectives of a technical data rights program:

- [1] Provide the necessary protection of a contractor's or subcontractor's proprietary and economic interests in technical data pertaining to an item, component, process, or identifiable subpart thereof developed using private or Government funds.
- [2] Achieve maximum long-term return on our research and development resources by promoting the use of technologies developed with Government funds in the production and marketing of new and improved products and processes for the Government and private markets.
- [3] Increase the long-term competitive base for all procurements by encouraging firms to offer their products with state-of-the-art technologies to the Government as substitutes for products of lower quality or performance and to avoid the loss of technological advantage in our national defense.
- [4] Reduce the Government's direct and indirect costs of managing technical data pertaining to items, components, processes, or identifiable subparts by requiring that, regardless of the source of funding, the Government

obtain royalty-free access to the technical data developed with Government funds rather than physical possession of the technical data.

In certain identifiable cases, the contracting officer should be prohibited from acquiring technical data, such as when the product or process is sold in significant quantities in the commercial market.

- [5] Limit the paperwork requirements to those necessary to meet specifically identified Government needs and minimize the burden on contractors and subcontractors of collecting and providing those technical data to the Government.

The Department's Regulation

[1] Acquisition Procedures. The Department states in the interim rule that, as general policy, it will acquire only the minimum essential technical data and data rights and will acquire them in a manner that is least damaging to the contractor's economic interest. However, the Department's rule lacks the essential regulatory ingredients to implement that policy. To ensure cost-effective defense procurement and to provide the necessary incentives for product innovation and competition, the regulation must provide more specific guidance for the contracting officer on when and how the Government should pursue its rights in technical data and, where appropriate, acquire greater rights in technical data.

These acquisition procedures must be integrated with the provisions of the rule that define the standard rights in technical data, since the Government's specific needs should correspond to the technical data rights acquired--the solution to the particular need or problem. Since these procedures would define how the Government would exercise its rights in technical data, they also should dovetail with the conditions under which the contractor will retain limited rights, obtain Government Purpose License Rights, or provide unlimited rights in the technical data. These procedures will then complement the existing regulatory requirements at 217.72, which specifically direct the contracting officer, after consulting with the other members of a project team, to "decide whether to procure data for future competitive acquisition."

[a] Specific Acquisition Procedures. Since the Department's rule provides only general policy guidance on technical data acquisition, the contracting officer, rather than proceed into uncharted territory, will most likely adopt the standard rights in technical data as defined in Section 227.472-3 of the rule as a "default" procedure. This can easily lead to

acquisition of, or claim to, rights in technical data that exceed those necessary to meet the particular needs of the Department, which in turn will result in losses in technological advantage and long term competition. For example, regardless of whether the Department needs those rights or whether the Department can meet its identified needs in a manner that is less damaging to the economic interest of the contractor, the Department under this rule will obtain unlimited rights in technical data previously delivered with limited rights or Government Purpose License Rights which have expired. Similarly, while the rule provides that "to encourage commercial utilization of technologies developed under Government contracts, the Government may agree to accept technical data subject to Government purpose license rights (GPLR)," because the contracting officer is provided with no specific guidance on when that approach is acceptable, the use of GPLR will be very limited.

To achieve a more effective allocation of rights in technical data, we urge you to include a set of acquisition procedures in the rule. These procedures in effect would serve as a set of screening devices, first to reduce the Department's data rights acquisition to only those specifically needed by the Government, and, second, where access to the technical data is necessary, to ensure that those needs are met in the manner that provides for full consideration of the potential damage to the economic interests of the contractor.

The use of these acquisition "screens" would compel the contracting officer to: (1) identify the need for the data, (2) fit the solution to that need, and (3) include in his determination of the appropriate solution the potential damage to the economic interest of the contractor. For example, technical data pertaining to form, fit, or function, technical data necessary for repair, operation, maintenance, or training activities, technical data prepared or required to be delivered that constitute corrections or changes to Government-furnished data, and technical data otherwise publicly available would be caught by the "first screen" and deemed "unlimited rights" data by the Government. These technical data generally are essential for the effective and efficient operation of the agency. The Department would then further screen the remaining technical data developed exclusively with Government funds to determine those necessary to meet other specifically identified needs. The Department would determine the best means to both meet the Government's specific needs and limit the damage to the potential commercial use of the technology. A "third screen" would identify those technical data developed exclusively with Government funds for which we have no clearly identified need but want to retain the right to obtain access to the data in the future under a deferred ordering arrangement. Technical data pertaining to items, components, or processes

developed at private expense, except in very limited circumstances, should not be acquired by the Department at all. Thus, to continue the above analogy such data should pass through all of the Government acquisition "screens."

In our February 1988 letter, we provided a set of such acquisition procedures. We continue to view these procedures as absolutely essential to meet the objectives of the technical data regulation. We therefore recommend the following as a replacement for Section 227.472-2 in the Department's rule:

227.472-2 Procedures for acquiring rights in technical data:

Regardless of the source of development funding for the item, component, identifiable subpart, or process, before acquiring technical data or rights in technical data pertaining to that item, component, subpart, or process, except as specified in 227.472-3 (a):

(a) The Government should not acquire technical data or rights therein, unless the contracting officer determines that the Government will need to reproduce the item, component, identifiable subpart, or process pertaining to the technical data and none of the following conditions apply:

(1) The original item, component, subpart, or process or a readily introducible substitute that will meet the performance objectives is commercially available;

(2) Performance specifications or samples of the original item, component, or subpart, or demonstrations of the process will provide sufficient information to potential contractors;

(3) The contractor or subcontractor developing the technical data will permit through direct licensing or nondisclosure agreements or other means other potential competitive sources of supply to use the technical data to furnish the item, component, subpart, or process to the Government.

(b) (1) If the requirements of (a) have been met, then the contracting officer should assess whether the expected savings from meeting procurement or other clearly specified objectives through the acquisition of technical data or rights in technical data relating to an item, component, identifiable subpart thereof, or process are likely to exceed: (i) the full costs of acquiring such data or rights in such data, including additional costs to the Government; and (ii) the full

costs of other alternatives (see (a)) and feasible proposals identified in consultation with the contractor or subcontractor that may meet the Government's objectives.

(2) The contracting officer should actively consider the alternative(s) for which the expected net savings (expected savings minus expected full costs) are likely to be maximized. If the expected savings do not exceed the expected costs for any alternative, then the contracting officer should omit such alternative(s) from active consideration.

(3) If, in accordance with the requirements in (a), the contracting officer concludes that acquisition of greater rights in technical data developed at private expense is necessary, the Government should negotiate and enter into a separate agreement with the contractor and include as an express contract provision all limitations or restrictions on its right to disclose the technical data outside the Government.

(c) When the requirements of (a) and (b) have been met and the contracting officer concludes that the acquisition of technical data or rights in technical data is necessary, the contracting officer should negotiate to acquire and use the technical data or rights in technical data to meet its specific needs in a manner that is least damaging to the developing contractor's or subcontractor's identified property rights and economic interests. Such release or disclosure of the technical data by the Government to a third party will be subject to a prohibition against further release, disclosure, or use of such technical data for commercial purposes by the third party unless otherwise permitted by the developing contractor or subcontractor.

The provisions at (a) would prohibit the contracting officer from considering acquisition of technical data when alternatives clearly exist that will meet the Government's needs with less damage to the contractor's economic interest in the technology and less short and long term cost to the Government.

The provisions at (b) would provide guidance to the contracting officer in the assessment of alternatives to Government acquisition and physical possession of technical data. Most importantly, these provisions would encourage the contracting officer to solicit actively proposals from the contractor on how to meet the Government's needs with less damage to the commercial value of the technology. Clearly, if the contractor's proposals do not adequately address the

Government's needs, would require substantial resources to implement and administer, or appear to be frivolous, then the contracting officer would reject them in accordance with the provisions in (b)(2). The dialogue with the contractor as envisioned here would be virtually costless. However, the benefits to the Government are likely to be significant, since this dialogue would promote consideration of all feasible alternatives and reduce the opportunity costs associated with losses of technological advantage and reductions in the competitive base.

The provisions at (c) simply state that, if the Department must exercise or acquire rights in technical data beyond those specified as "unlimited rights" in Section 227.472-3(a), it would provide, wherever possible, protections against further disclosure.

[b] Conditions for Commercial Use of Technologies Exclusively Funded By the Government. The acquisition procedures presented above would be supplemented by more explicit guidance for the contractors and contracting officers regarding implementation of Government Purpose License Rights. The Department's Section 227.472-3(a)(2) should be replaced with the following:

Section 227.472-3(a)(2) It is the policy of the Government to encourage the use of technologies developed under Government contracts for commercialization. When the development of an item, component, identifiable subpart thereof, or process was developed exclusively with Government funds and access by or on behalf of the Government to the technical data relating to that item, component, identifiable subpart, or process is required, the Government will obtain Government Purpose License Rights if: the contractor or subcontractor notifies the contracting officer of its intent to commercialize the technology depicted or described by the technical data, unless the technical data must be publicly disclosed to meet the Government's specifically identified objectives and the requirements of Section 227.472-2 have been met.

(i) Government Purpose License Rights shall be royalty-free and subject to reasonable time limitations as agreed to by the parties. Time limitations are necessary to ensure that the technology embodied in the technical data is not suppressed or abandoned and to offer commercial opportunities to other parties. Time limitations may be determined in part by the contractor's contribution to the development of the technology, the contractor's past history of commercialization of technologies developed under Government contract (if known), likely economic life of

the technology, and an assessment of the potential net social benefits that may be provided by an expansion of commercial opportunities to other parties.

(ii) The Government should negotiate with the developing contractor or subcontractor any procedures (for example, those to be specified in any direct licensing or nondisclosure agreements) that may be required to ensure that the Government has the necessary access to the technical data to meet the Government's competition objectives. These procedures should be specified in an agreement as soon as practicable during the research and development phase of the contract under which the technical data are developed. Such agreements may include an option for any future licensee to purchase technical assistance from the developing contractor. The contracting officer should negotiate payment to be made to the developing contractor in accordance with the costs of providing technical assistance and that contractor's contribution to the development of the technical data.

(iii) If the contractor or subcontractor does not notify the contracting officer regarding an intent to commercialize the technology, does not agree to commercialize the technology within a reasonable time period, or fails to comply with any agreements concerning use of the technical data by or on behalf of the Government, then the Government may obtain unlimited rights in such technical data and all requirements in these regulations that pertain to unlimited rights data will apply.

(iv) If the requirements of Section 227.472-2 have been met and the Government concludes that the acquisition of technical data or rights in technical data is necessary, then the Government should not impose any limitations or restrictions on the contractor or subcontractor's concurrent right to also use the data for its own commercial purposes (unless specifically prohibited from doing so by statute or for national security reasons). Any release or disclosure by the Government to a third party or use by a third party for Government purposes of the technical data to which the developing contractor has obtained exclusive commercial rights will be made subject to a prohibition that the third party may not further release, disclose, or use these technical data for commercial purposes unless otherwise permitted by the developing contractor.

(v) All direct costs incurred by the developing contractor or subcontractor to negotiate the rights to commercialize a technology developed with Government funds and any procedures to provide Government with

necessary access to the technical data are not reimbursable by the Government.

The conditions at (a)(2)(ii) would provide that a contractor, who for a period of time receives the exclusive right to use the technologies developed exclusively with Government funds, would be obligated as appropriate to provide the corresponding technical data to other potential suppliers. The Government and the developing contractor would specify in a contract how an exchange of such technical data would be made between the developing contractor and any potential suppliers. With this approach, the Government would not become directly involved in the distribution of the technical data unless the developing contractor fails to meet the exchange conditions as specified in a contract, in which case he would lose the commercial rights and the Government would claim unlimited rights to those technical data. Clearly, if the contracting officer should have any serious reservations about the long term availability of the technical data, then he could require in a contract that the technical data be placed in escrow.

Under these procedures, the Government's administrative costs to manage, verify, and store the technical data would be reduced substantially. The direct responsibility for maintaining and retrieving the data, for the most part, would be on the contractor, not the Government. Because the developing contractor will be responsible for entering into any nondisclosure agreements (based on a model agreement that would reflect accepted commercial practice) with potential Government suppliers and monitoring such agreements, he will have greater assurance that the technologies in which he has invested substantial resources for further development and marketing will not be used by a potential Government supplier for commercial purposes. The Government would become directly involved in the completion of nondisclosure agreements with potential suppliers only when the Government has taken physical possession of the data and certain limited circumstances apply. Finally, the Government also would be able to allocate its resources to better management of technical data that are necessary for form, fit, and function, operation, maintenance, repair, training of employees, etc.

These conditions of commercial use would impose a threshold determination of the contractor's interest. If the contractor's burden of meeting the conditions of commercial use, including any maintenance and retrieval activities for the purpose of exchange of the technical data with potential suppliers, exceeds the likely benefits to be derived from commercial application of the technology, then the contractor most likely would not ask for Government Purpose License Rights or would receive them with the full understanding that

the Government may disclose the related technical data to potential suppliers for Government purposes, i.e., with higher risk of disclosure.

These acquisition procedures at 227.472-2 and conditions of commercial use at 227.472-3(a)(2) would increase competition in the long term and significantly decrease the Department's procurement lead time. First, more companies would enter the contract process if, as the developing contractor, they would have access to commercially valuable technologies developed under Government contract. Increasing competition in private and Government markets will encourage contractors to take full advantage of technological opportunities, including those provided by the Government. Second, we are likely to see an increase in product availability and innovation, as companies apply technologies developed under Government contract to produce new products or enhance existing ones. Third, we should see faster and more complete delivery of technical data to potential suppliers. The exchange of technical data with potential suppliers would be a contractual obligation of the developing contractor; failure to meet that obligation could result in loss of the contractor's commercial rights and could diminish considerably the return on his investment. Also, we would eliminate the time and resources required for the Government to serve as the intermediary in the data exchange between contractors. For example, if the potential supplier receives a technical data package that appears to be incomplete or inaccurate, then he would immediately contact the developing contractor for clarification of his particular problem and avoid the otherwise elongated process of dealing through the Government. Fourth, because mere delivery of the technical data to a potential supplier is often insufficient, this approach would provide the means for the potential contractors to request directly technical assistance from the developing contractor as part of the exchange of technical data. Such technical assistance would be tailored to meet the particular needs of each potential supplier, since he would pay for any assistance costs. In sum, we would save procurement time and Government resources, would increase competition, and would enhance the effective use of technical data packages.

This approach to Government Purpose License Rights would also be useful in guiding the contracting officer during negotiation of rights to technical data developed with private and Government funds. We would therefore urge the Department to expand the potential use of Government Purpose License Rights or variations thereof to mixed funding situations.

[2] Definitions The new definitions in the rule in Section 227.471 for "developed exclusively at private expense" and "developed exclusively with Government funds" appear to limit

arbitrarily those technical data that will be considered to pertain to an item, product, or process developed at private expense. These definitions seem to thwart indirectly not only the intentions of the Executive Order, but also the requirements of the Defense Authorization Act of 1987 regarding protections for technical data developed at private expense.

[a] Definition of "Developed Exclusively at Private Expense." The Department defines "developed exclusively at private expense" as:

"in connection with an item, component, or process, that no part of the cost of development was paid for by the Government and that the development was not required as an element of performance under a Government contract or subcontract."

The Department then defines "required as an element of performance" as:

"in connection with the development of an item, component, or process, that the development was specified in a Government contract or subcontract or that the development was necessary for performance of a Government contract or subcontract."

Under these definitions, the Department apparently would categorize technical data pertaining to an item, component, or process developed by the contractor solely with his resources as Government funded, as long as that item, component, or process was in any way necessary to complete the tasks defined by a contract or subcontract.

These definitions do not appear to contribute to the achievement of any of the objectives identified previously. The Department's approach clearly will not encourage a contractor to spend his scarce resources to improve performance under a contract or to provide his superior product to meet the requirements of a contract if, as these definitions seem to imply, we intend to deny that contractor the proprietary rights to that technology. The objective of a technical data rights regulation should not be to limit wherever possible those technical data to which the contractor can claim proprietary rights, especially when the such an approach will seriously erode the competitive and technology base available to the Department.

We propose an alternative definition of "exclusively at private expense," which would meet the objectives of a technical data regulation:

"Exclusively at Private Expense" as used in this subpart

means that any of the direct costs of development of the item, component, identifiable subpart thereof, or process in which the technical data are embodied has not been paid in whole or in part by the Government. Government-sponsored independent research and development and bid and proposal costs are not to be considered Government funds. Payments to the contractor for indirect costs incurred under a Government contract are not to be considered Government funds when the direct costs of developing the item, component, identifiable subpart thereof, or process in which the technical data are embodied has not been exclusively funded by the Government."

[b] "Developed Exclusively with Government Funds." The Department defines "developed exclusively with Government funds" as:

"in connection with an item, component, or process, that the cost of development was directly paid for in whole by the Government or that the development was required as an element of performance under a Government contract or subcontract."

By applying two mutually exclusive tests--(1) paid for in whole by the Government or (2) required as an element of performance, the Department could claim unlimited rights to technical data even if the Government played a minor role in the development of the item, component, or process. For example, under the Department's definition, if the development of an item, component, or process was required as an element of performance under a contract, then the Department would claim that the technical data pertaining to the item, component, or process were "exclusively Government funded" even when the contractor provides 99 percent of the development funds.

Furthermore, under this definition together with the definition of "required as an element of performance," the Department could obtain unlimited rights in any technical data, regardless of the mix of funding, as long as the development of the item, component, or process was necessary for the performance of the contract. Consequently, if a contractor develops an item solely using his resources and the item was used in the development of a product for the Government, then the technical data pertaining to the contractor's proprietary item will revert to the Government as unlimited rights data.

The Department's claim of unlimited rights for such technical data will seriously reduce the contractor's incentive to make available to the Government his state-of-the-art technology or to use substantial resources to further develop a product

under a Government contract. The opportunity costs of such a program will be incurred by the Department of Defense, as losses in the competitive and technological base.

We urge the Department to consider an alternative definition of "developed exclusively with Government funds," which would avoid would avoid these costs:

"Developed Exclusively with Government Funds," as used in this subpart, means that the direct costs of development of the item, component, identifiable subpart thereof, or process have been paid in whole by the Government and that such development was specified as an element of performance under a Government contract."

[3] Redundancy and Burden of the Notification Requirements in Sections 227.472-3 and 227.473-1. The Department's rule appears to require at least four separate documents from the contractor or subcontractor regarding the identification of rights in technical data: (a) a "preaward notification" (227.473-1(a)(2)) to identify products or processes that would result in delivery of technical data to the Government with other than unlimited rights; (b) "continual postaward notification" (227.473-1(a)(3)) during performance of the contract prior to committing to the use of a privately developed product; (c) a "certification" (227.473-1(a)(4)) to accompany any response to a solicitation and the notifications of (a) and (b), which is to provide an identification of the contract under which the technical data are or were delivered, the expiration date and limitation on the Government's use, and an authorization for the contracting officer to request additional information to evaluate the assertions; and (d) a "listing" (227.472-3) of technical data delivered with other than unlimited rights as required by the clause at 252.227-7013.

The Paperwork Reduction Act of 1980 as amended (44 U.S.C. Chapter 35) and its implementing regulations at 5 CFR 1320 require that any collection of information from the public cannot be duplicative with any other collection by the Federal Government and that such collections of information must be the least burdensome necessary to meet the Federal agencies clearly identified needs. The notification requirements in the Department's rule do not appear to meet either of these requirements. We recommend that the Department simplify the notification procedures to eliminate the redundancy and reduce the burden.

The listing requirement in Section 227.472-3 and the clause at 252.227-7013 raises other concerns as well. According to the Department's rule, if the contractor mistakenly does not include in this listing technical data pertaining to a

privately developed product, then the Government will claim unlimited rights to those data. Apparently, the Government will claim such rights even if the contractor has legitimately stamped "limited rights" on the technical data package simply because the contractor failed to include the data on the list. This provision is completely alien to the objectives of a technical data rights regulation and may be contrary to the express provisions in the law. With this requirement, the Department seems to be attempting to catch the contractor or subcontractor with an incomplete list and thereby claim unwarranted rights to technical data. The added risk associated with this listing certainly will not encourage contractors to make their state-of-the-art technologies available to the Government and will most likely discourage further development and innovation of technologies developed under Government contract. Further, the added risk provides no new information to the Government, since the list appears to be redundant with the three other notification requirements in the rule.

We would therefore urge that you consider a streamlined approach that will meet the Government's need for information at considerably less cost to the contractor or subcontractor:

227.473-1 Procedures for establishing rights in technical data

(a) Notification. When the technical data pertain to an item, component, identifiable subpart thereof, or process developed exclusively with Government funds, the Government, in accordance with 227.472-3(a)(2), will obtain Government Purpose License Rights for the time specified in an agreement with the contractor or subcontractor. When technical data developed exclusively at private expense are to be used in a Government contract, the contractor or subcontractor, to the maximum practicable extent, should declare the use of such data before the contract is awarded.

(i) If delivery of technical data developed at private expense is expected under a Government contract, the provision at 252.227-7035, "Notification of Limited Rights in Technical Data," shall be included in the solicitation. Under this provision, offerors are required to identify to the maximum practicable extent the use of the items, components, identifiable subparts thereof, processes, or computer software that would result in technical data to be delivered to the Government with limited rights.

(ii) Any technical data delivered to the Government with limited rights must be identified in a contract prior to the delivery of the technical data to the Government. This is necessary for the Government to make informed

judgments concerning the life-cycle costs of alternative means of achieving competitive procurement of items, components, processes, subparts, or computer software and to ensure Government protection of technical data developed exclusively at private expense.

(iii) The Government may challenge in a timely manner in accordance with 227.473-4 assertions by the contractor or subcontractor that the technical data are developed exclusively at private expense.

(b) Identification of restrictions on Government rights.

(i) The clause at 252.227-7035 requires offerors and contractors to notify the Government of any restrictions or potential restrictions on the Government's right to use or disclose technical data pertaining to an item, component, identifiable subpart, process, or computer software that are required to be delivered under the contract. This notice advises the Government of the contractor's or any subcontractors' intended use of the items, components, processes, subparts, and computer software that are required to be delivered under the contract and that: (1) have been developed exclusively at private expense (see 227.472-3(b)); and (2) embody technology that the contractor or subcontractor intends to commercialize (see (227.472-3(a))).

(c) Certification of Intent to Commercialize or to Use Items, Components, Subparts, Processes, or Computer Software Developed with Government Funds. In accordance with 227.472-3, the developing contractor or subcontractor must provide within a reasonable period of time written certification of its intent to commercialize the technology embodied in items, components, subparts thereof, processes, or computer software that have been developed exclusively with Government funds.

(d) Establishing rights in technical data. After receipt of a contractor's or subcontractor's notifications and certifications in accordance with (a), (b), and (c) the contracting officer, when the requirements of 227.472-2 have been met, should enter into agreements establishing the respective rights of the parties in the technical data pertaining to any item, component, identifiable subpart, process, or computer software so identified. The respective rights shall be based on a consideration of the requirements and standard rights as provided in Section 227.472-3 and on negotiations pursuant to 227.472-2 and 227.473-1 and shall be documented to the maximum practicable extent in written agreements made part of the contract. These

agreements should be established prior to the contractor's or subcontractor's commitment to use the item, component, identifiable subpart, process, or computer software, but must be established no later than delivery of the technical data or computer software to the Government. Before agreeing to include any description of rights in technical data pertaining to any item, component, process, subpart, or computer software in the agreement, the contracting officer should assess the reasonableness of the contractor's or subcontractor's assertion and in accordance with the requirements of 227.472-2 consider the likely impacts of such assertion on the Government's needs. After such an evaluation the contracting officer may:

(i) concur with the contractor's assertion and conclude the agreement;

(ii) if the contracting officer has evidence of reasonable doubt about the current validity of the offeror's assertion, submit to the offeror a written request, which includes documentation of the evidence of reasonable doubt, to furnish evidence of such the assertion; or

(iii) if the requirements of 227.472-2 have been met and the acquisition of technical data or rights to technical data is necessary, enter into negotiations with the contractor to establish the respective rights of the parties in the technical data or computer software.

[4] Redundancy of Section 227.473-1(b)(2)(i)(B). This Section in the Department's rule indicates that the contracting officer will not negotiate Government Purpose License Rights if the technical data are needed for immediate competition and protection of the contractor's rights would be "unduly burdensome on the Government."

The application of the first test--needed for immediate competition--is unclear, since the definition of "immediate" is not provided in the rule. It is difficult to imagine a competition that is needed before a contract with the developing contractor is signed by the respective parties. Since the procedures under which the developing contractor would exchange any technical data in which he has a commercial interest should be specified in a contract in the early stages of development, the application of the first test would seem to be a very rare event. This apparently narrow construction is fortunate, if correct, because any other interpretation of "immediate" would seem to unnecessarily discard opportunities for commercial use of technologies developed under Government contract and, hence, result in losses of technologically advanced defense products

for the Government.

The contracting officer will also lack guidance on the application of the second test--unduly burdensome, which also lacks definition in the Department's rule. We would suggest that the rule include guidance to the contracting officer in accordance with the acquisition procedures we provide at item [1][a]. This will clearly articulate the evaluation process that the contracting officer should follow in determining when negotiation is appropriate. Thus, this Section could be eliminated and a reference to our proposed 227.472-2 provided in its place.

[5] Clauses and Reporting Requirements. We would also urge that the Department review and simplify wherever possible the reporting requirements in the rule. In accordance with the Paperwork Reduction Act, information collections in Federal agency regulations must be necessary, must be the least burdensome means to meet the agency's need, and cannot be duplicative with any other Federal collection of information.

Case Management Record

Info
EXOC SEC

DAR Case No. 87303	CAAC No.	Original Updated	Date 6/23/88
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Title **Technical Data**

Reference

Synopsis

Additional Public Comment

Priority	Submitted By	Originator Code	Case Manager
Keywords			
Case References			
FAR Cites			
DFARS Cites			
Cognizant Committees			

Recommendation

TASK TO Committee

Notes



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May 24, 1988

Mr. Charles W. Lloyd
Executive Secretary
ODASD(P)DARS
c/o OASD(PL) (MRS)
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Ref: DAR Case 87-303

Dear Mr. Lloyd:

The University of Connecticut wishes to submit the following comments with respect to the interim rule published at 53 FR 10780 under the DFARS Subpart 227.4 - Technical Data, Other Data, Computer Software, and Copyrights and the clause at 227.252-7013.

Our position with respect to data rights on federally funded research is summarized below, followed by our recommended revisions to the interim rule.

UNIVERSITY POSITION

Public Law 96-517, as amended, by giving nonprofit organizations and small businesses the right to own and commercialize patentable inventions resulting from federally funded research grants and contracts, has facilitated stronger research relationships and technology transfer between universities and industry.

University technology, however, involves not only patentable inventions but technical data and software. The absence of a federal policy for technical data and software which parallels that for patentable inventions is a substantial disincentive blocking the effective commercialization of many technologies by U.S. industry.

The University of Connecticut position was presented by COGR representatives in testimony presented on April 30, 1987, before the House Subcommittee on Science, Research and Technology. That testimony strongly endorsed Section 1(b)(6) of the April 10, 1987, Executive Order, "Facilitating Technology Transfer" and is included as Attachment 1.



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UNIVERSITY COMMENTS ON INTERIM RULE

Our comments on the interim rule and recommendations for revision are set forth below and amplified in Attachment 2, General Comments.

Recommendations 1 through 8 would revise the regulations and the applicable contract clause in a manner intended to ensure that the rights acquired by the government from all contractors are adequate to meet essential Government purposes but not so broad as to inhibit the transfer of the technology or discourage industrial companies from investing in its further development and commercialization.

Recommendation 9 is an alternative directed solely at nonprofit contractors. Although we view it as preferable from a university standpoint, it is submitted as an alternative and not as a sole recommendation, in as much as we believe the effective transfer of technology to enhance U.S. competitiveness depends on adopting the same underlying principles for all R&D contractors including industrial organizations and federal laboratories, as we are recommending for universities and other nonprofit institutions.

A. GENERAL ACQUISITION POLICY

The acquisition policy set forth in Part 227.472-1 of the interim rule implies that only the government itself can fulfill its obligations with respect to the dissemination of research results. The University recommends two changes to recognize the traditional and increasingly active role of universities in disseminating the results of Federally funded research.

Recommendations 1 and 2

Under 227.472-1(b) - Add the following sentence:

"Universities and other nonprofit organizations, on the other hand, play an important role in disseminating the results of fundamental research to the industrial sector and government policy should not inhibit that transfer."

Under 227.472-1(c) - Add the underlined phrase so that the second sentence reads as follows:

"When the Government pays for research and development, it has an obligation to foster technological progress through wide dissemination of the information by the Government or through technology transfer programs conducted by the contractor and, where practicable, to provide competitive opportunities for other interested parties."

B. IMPACT OF UNLIMITED GOVERNMENT RIGHTS

Under the interim rule, the government acquires unlimited rights to technical data and to computer software generated in the course of a contract whether or not it pertains to parts, components or processes needed for procurement; whether or not the government has a need for it; and whether or not it has been specified for delivery.

As set forth in Attachment 2, General Comments, this creates major difficulties for the universities by discouraging collaboration with industry

and by requiring the almost impossible task of identifying and segregating technical data and computer software attributable to a specific time period on a research program which has been generating data and software cumulatively over a much longer period. The existence of unlimited rights in the government, whether or not exercised, seriously inhibits the contractor's ability to effectively transfer technical data and software to the commercial sector.

These views are substantially the same as those expressed by Federal laboratory personnel in the GAO study "Technology Transfer - Constraints Perceived by Federal Laboratories and Agency Officials" (GAO/RCED-88-116BR), which was issued in March 1988. An excerpt from that report is included in Attachment 2.

The University believes that any rights which the government obtains in technical data and computer software should be limited to data for which the government has a need which cannot be met by other means or which is specifically required to be delivered under the terms of the contract. We propose the following:

Recommendations 3, 4, 5

3. Minimum government needs. Under 227.472-2, add the following:

"Where the technical data or computer software results from research and development contracts and does not pertain to items, components or processes to be competitively acquired or needed for repair, overhaul or replacement, DOD will encourage dissemination and commercialization by the contractor."

4. Technical data. In the clause at 252.227-7013 under (b) (1), Unlimited Rights, (and in the text at 227.472-3 (a) (1)), revise (i) and (ii) to add the underlined language:

"(i) Technical data pertaining to an item, component, or process which has been or will be developed exclusively with Government funds provided the contracting officer has identified a specific need for the data and that need cannot be met through other means.

"(ii) Technical data resulting directly from performance of experimental, developmental, or research work where delivery of such data was specified as an element of performance under a Government contract or subcontract."

5. Computer software. In the clause at 252.227-7013, under (c) (2), Unlimited Rights, revise (i) and (ii) by adding the underlined language:

"(i) Computer software resulting directly from performance of experimental, developmental or research work where delivery of such software was specified as an element of performance in this or any other Government contract, or generated as a necessary part of performing a contract, where delivery of such software is specified as an element of performance."

C. GOVERNMENT PURPOSE LICENSE RIGHTS IN TECHNICAL DATA

Subparagraph 227.472-3 (a) (2) of the interim rule provides an exception to unlimited Government rights under which the Government may agree to accept Government purpose license rights "To encourage commercial utilization of technologies developed under Government contracts..."

However, (2) (ii) provides that "the contracting officer should not agree to accept GPLR when -

"(A) Technical data are likely to be used for competitive procurement involving large numbers of potential competitors, for items such as spares"; and

"(B) Technical data must be published (e.g., to disclose the results of research and development efforts."

This pairing of competitive procurement and the dissemination of research results as functions for which commercial utilization will not be encouraged is both inexplicable and alarming to the universities. It can easily be interpreted as a specific constraint on the ability of universities to transfer technology generated in the course of basic and applied research programs, which appears diametrically opposed to the President's Executive Order 12591 and emerging Federal policy.

Recommendation 6

We recommend that 227.472-3 (a) (2) (ii) (B) be omitted and a new section, added:

"(iii) When the government does not require immediate use of the data for competition and the contractor is a university or other nonprofit organization which has an interest in commercializing the data, the contracting officer will accept Government Purpose License Rights, which will expire after a specified period of time."

D. GOVERNMENT ACQUISITION OF RESTRICTED RIGHTS IN COMPUTER SOFTWARE

As noted by Federal laboratory officials in the GAO study cited in Attachment 2, General Comments, the effective dissemination of software by those who created it requires the same policies as governs patents. Unlimited government rights have inhibited dissemination and commercialization.

Software generated in the performance of university research, like that created in the Federal laboratories, is normally in a state of continuing development and enhancement that cannot be frozen at a point in time or neatly attributed to specific authors or funding. Its successful dissemination and commercialization frequently requires the continuing involvement of the original authors who created and understand its architecture and the intricacies of its source code. If an institution has established a program for the dissemination of computer software, that institution should be free to pursue it.

Recommendation 7

With respect to computer software, in the clause at 252.227-7013,

revise (c) (1) Restricted Rights by adding a new subparagraph (iii) which would parallel the proposed new subparagraph (iii) under GPLR above:

"(iii) In cases where the Government would otherwise be entitled to unlimited rights, unless the Contracting Officer determines during the identification of needs process that unlimited rights are required for the purposes of competitive procurement of supplies or services, the contracting officer shall agree to accept restricted rights when the contractor is a small business or nonprofit organization which agrees to commercialize the technology."

E. NEGOTIATION FACTORS

As elaborated in Attachment 2, General Comments, it is quite likely that technical data and computer software generated in the performance of university research will be the cumulative result of continuing research conducted over a period of time with multiple sources of funding and may involve the participation of students and others whose effort is supported by university funds or other support. It is, therefore, quite likely that university research will frequently involve mixed funding.

Consequently, it is desirable that some norm be established to guide the negotiation of government-university rights in technical data and computer software.

Under 227-473-1 (b) (2) a series of negotiation factors and negotiation situations are provided as guidance for the contracting officer when negotiating rights in technical data developed with mixed funding or when the Government negotiates to relinquish rights or to acquire greater rights.

The University believes it is essential that guidance be added for situations involving technical data generated in the course of research conducted by universities and other nonprofit organizations.

Recommendation 8

Add the following new subparagraph to (b) (2) (ii):

"(D) When the government does not have a need to use the data for competition and the contractor is a university or other nonprofit which is interested in commercializing the data, the government will negotiate Government Purpose License Rights which will expire if the contractor fails to make reasonable efforts to pursue commercialization."

F. AN ALTERNATIVE RECOMMENDATION - ADOPT ALTERNATE II

Technical data and computer software generated in the course of university research rarely involves the competitive procurement of items, components, parts, and processes. Consequently, data regulations focused primarily on competitive procurement are particularly inappropriate for university research. Modifying those regulations so that they do not inhibit the transfer of technology between universities and the commercial sector is exceedingly difficult.

The applicable clause, 252.227-7013, does contain, in Alternate II, provisions that would be significantly more appropriate and workable for university research than those addressed above. Part 227.479 Small Business Innovative Research Program (SBIR Program), in response to Public Law 97-219, requires in subparagraph (d) that the clause at 252.227-7013, with its Alternate II, shall be included in all contracts awarded under the SBIR Program which require delivery of technical data or computer software.

The following recommendation is, therefore, provided as an alternative to recommendations 4 through 8, set forth in B through E above:

Recommendation 9

Establish a new section 227.483 providing colleges and universities with rights in technical data and computer software comparable to those provided in Section 227.479 for the SBIR Program; or modify Section 227.479 by revising the title to read "Small Business Innovative Research Program (SBIR Program) and University Research Programs"

Add the following new paragraph (e):

"(e) The clause at 252.227-7013, Rights in Technical Data and Computer Software, with its Alternate II, shall be included in all contracts awarded to colleges and universities for the conduct of basic or applied research, which do not require the delivery of technical data or computer software needed by the Government for the competitive procurement of items, components, or processes."

In Section 227.471, Definitions, modify the definition of Government Purpose License Rights to read in Part:

"and in the SBIR Program and for colleges and universities, computer software...."

We appreciate the opportunity to comment.

Sincerely,

Richard J. Carterud

Richard J. Carterud
Director Office of Grants & Contracts

Thomas G. Giolas

Thomas G. Giolas
Dean of the Graduate School and
Director of the Research Foundation

Attachment 1 - TESTIMONY

COMMITTEE ON SCIENCE, SPACE AND TECHNOLOGY
SUBCOMMITTEE ON SCIENCE, RESEARCH AND TECHNOLOGY
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

FACILITATING ACCESS TO SCIENCE AND TECHNOLOGY

BY

GEORGE H. DUMMER
DIRECTOR, SPONSORED PROGRAMS
MASSACHUSETTS INSTITUTE OF TECHNOLOGY

ON BEHALF OF THE COUNCIL ON GOVERNMENTAL RELATIONS

APRIL 30, 1987

There are many answers because they are many elements which are essential to the transfer process. One of them, however, is a government policy which provides at the outset, not through the waiver process, that -

The ownership and the right to disseminate the research result and transfer the technology remain in the university which created it, and

The rights acquired by the government are adequate to meet essential government purposes, but not so broad as to inhibit the transfer of the technology or discourage industrial companies from investing in its further development and commercialization.

And the government has, at least in part, had such a policy since 1980, when P.L. 96-517 gave nonprofit organizations and small businesses the right to own and to commercialize patentable inventions resulting from Federally funded research grants and contracts.

Impact of P.L. 96-517

In my view, P.L. 96-517 and the amendments of P.L. 98-620, have had a significant and positive impact, starting with the elimination of some 26 different Federal patent policies, many of them involving the cumbersome waiver procedures which large business contractors find so troublesome today.

In addition, P.L. 96-517 has facilitated stronger research relationships between universities and industry. It has also encouraged the creation or expansion of university activities directed toward the transfer of university generated technology:

The MIT Technology Licensing Office which Mr. Preston directs is typical of the kind of activity in which a growing number of universities are engaged. It involves the transfer of technology by individuals with technical backgrounds and business experience who understand both the technology and the complications of transferring it to the commercial sector.

Dealing with Multiple Intellectual Property Rights

As universities have become more active in technology transfer, however, it has become increasingly obvious that the effective transfer of university generated technology requires dealing with a combination of intellectual property rights.

For example, a number of universities, including MIT, are working on nuclear magnetic resonance (NMR) imaging devices because, unlike x-rays used in CAT scans, magnetic fields have no known toxic side effects. But to achieve the accuracy of CAT scanned images requires a sophisticated and integrated hardware and software system.

- Any rights which the government obtains to technical data or software be limited to rights in data specifically required to be delivered or prepared under the terms of the contract or grant; and
- The Government acquire a royalty free license to use such technical data or software for specific government purposes, but not including the right to use it in a manner which might inhibit the transfer and commercialization of the technology by the university which created it or by the university's licensees.

Attachment 2 - GENERAL COMMENTS

1. GOVERNMENT ACQUISITION OF UNLIMITED RIGHTS TO ALL DATA GENERATED

The Government's acquisition of unlimited rights to technical data and computer software under 227.472-7013, which extends to everything generated, originated, developed, etc., in the course of a contract, is so broad that it creates a number of serious difficulties for universities and for other organizations performing Government research contracts.

Discouraging University-Industry Interactions

Prior to the passage of Public Law 96-517, many industrial companies were reluctant to support university research in areas of concurrent federal support. There were a variety of federal policies with respect to rights in inventions and no assurance in many that the university would be permitted to retain title and to license the industrial sponsor on an acceptable basis. Where rights could only be acquired by a time-consuming waiver process, there was no certainty of success. After the passage of P. L. 96-517, when the universities were in a position to retain title to inventions resulting from Federal projects and license them on reasonable and predictable terms, industrial companies showed significantly more enthusiasm for funding research in areas of Federal interest and acquiring license rights and reduce to practice those inventions which were conceived with Federal research funding.

The same situation exists today with respect to computer software and other technical data as existed for patentable inventions prior to 1980. Industrial companies are reluctant to fund the development of software at universities when a Federal agency acquires unlimited rights in all software developed, whether or not the government has a need for it, and is in a position to make that software available to all comers without restriction.

These views are substantially the same as those expressed by Federal laboratory officials as reported in the GAO study "Technology Transfer - Constraints Perceived by Federal Laboratories and Agency Officials" (GAO/RCED-88-116BR), which was issued in March 1988. As summarized in the transmittal letter (B-207939) to that report, the findings dealing with computer software are as follows:

"In summary, the federal laboratory and agency officials we interviewed support the thrust of legislation and executive actions during the past 10 years to improve the link between the federal laboratories' technology base and U.S. business. These laws authorize federal laboratories to patent and exclusively license inventions and collaborate with businesses on research and development. Many of these officials stated, however, that the four identified constraints need to be addressed to further improve the effectiveness of their laboratories' technology transfer efforts. They believe that removing or reducing these constraints would (1) provide more incentives to transfer computer software technology to U.S. businesses, (2) encourage U.S. businesses to make better use of federal laboratory resources, and

research team an opportunity to advance the state of the art. Consequently, the data and software which it generates is the cumulative results of a continuing program which cannot be frozen in time.

FCCSET Policy Statement

In sharp contrast to the policy reflected in the interim rule, a government-wide data policy statement developed (but never issued) by a subcommittee of the Federal Coordinating Council for Science, Engineering and Technology (FCCSET) contained the following statement in its February 1985 revision. Although the subcommittee was disbanded before issuing a final policy statement, the language is particularly realistic from a university standpoint:

"...It must also be recognized that in many cases the data will build upon past experience, expertise, know-how and organizational abilities which the contractor or subcontractor brings to the project. As a practical matter, it is not likely that a meaningful segregation can be made between the know-how and expertise generated under the contract and the know-how and expertise which the contractor previously possessed and applied to the contract."

" Any rights which the government obtains to technical data will be limited to rights in data specifically required to be delivered or prepared under the terms of the work statement, reporting requirements, or specifications of the contract or grant. Broad and sweeping terminology giving the government rights in 'all data first produced or generated in the course of or under this contract' or 'in all data generated under this contract whether or not delivered' should be avoided."

This, of course, is particularly true of software, which is constantly being developed, refined, debugged, enhanced, used for derivative works, and issued and reissued in successive releases.

Attachments

cc: President Casteen
Interim Provost McFadden
Interim V.P. for Finance Popplewell

Case Management Record

See - send 2
copies to Mr. Sumner

EXOC SOC

DAR Case No. 87-303	CAAC No.	Original Updated	Date 6/15/88
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Title Tech DATA

Reference

Synopsis

Public Comments

Priority	Submitted By	Originator Code	Case Manager
Keywords			
Case References			
FAR Cites			
DFARS Cites			
Cognizant Committees			

Recommendation

Notes

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Ronald W. Hodges
General Manager
Military Programs

May 24, 1988

DEFENSE ACQUISITION REGULATORY COUNCIL
The Pentagon, Room 3D139
Washington, D.C. 20301-3062

Attention: Mr. Charles W. Lloyd, Executive Secretary
ODASP (P) DARS, c/o OASD (P&L) (MRS)

SUBJECT: DAR CASE 87-303, INTERIM RULE ON RIGHTS IN
TECHNICAL DATA

The BFGoodrich Company, Aerospace and Defense Division, Aircraft Wheel and Brake Operations, develops, manufactures, and supports aircraft wheels and brakes for commercial, general aviation, and military customers worldwide. One of the keys to the success of our business in all of these markets is that all of our technical data has been developed by us at our expense. However, legal and regulatory changes over recent years have threatened to erode or outright destroy our position with respect to proprietary data in the military market.

Because of the need to protect our past and continuing investment in proprietary technical data we, along with several other companies, have become members of the Proprietary Industries Association (PIA). We have reviewed the comments on the interim rule prepared by PIA and endorse their position.

We would like to emphasize, in particular, BFGoodrich's objection to that part of the definition of "Developed Exclusively at Private Expense" which reads "... the development was not required as an element of performance of a Government contract or subcontract." First, this language would essentially require a contractor or subcontractor who wanted to declare his data for an item to be proprietary to know whether any Government contract or subcontract with any contractor or subcontractor ever required or was requiring the development of the same or equivalent item. This is not possible. Second, the language is not clear if the development required was to be performed at any time during or before the contract. It seems reasonable to conclude that the use of an item, developed at private expense but used in the performance of a Government contract or subcontract would be declared

DEFENSE ACQUISITION REGULATORY COUNCIL

May 24, 1988

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not to be developed exclusively at private expense, only because its development could have been interpreted as having been required under a particular contract or subcontract.

The offending language should, therefore, be removed from the definition. Because of the reasons cited above, the additional language within the same definition which reads "All indirect costs of development are considered Government funded when development was required as an element of performance in a Government contract or subcontract" should be deleted.

We appreciate the opportunity to comment on this most important subject.

Sincerely,

THE BFGOODRICH COMPANY



Ronald W. Hodges
General Manager, Military Programs

/ph

National Tooling & Machining Association



June 9, 1988

HAND DELIVERED

Mr. Charles Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
ODASD(P) DARS
c/o OASD(A&L) (MRS)
Room 3D139
The Pentagon
Washington, D.C. 20301-3062

RE: DAR Case 87-303

Dear Mr. Lloyd:

The National Tooling & Machining Association appreciates this opportunity to submit these comments on the proposed revisions to DoD FAR Supplement provisions implementing the Fiscal Year 1988 Defense Authorization Act, P.L. 100-180, section 808.

NTMA represents the tooling and machining industry. This industry is composed of 14,000 plants almost all of which are small business concerns. These companies build special tools, dies, jigs, fixtures, molds, gauges, special machines (automation, robotics, and production lines) and precision machine parts or components. They use a wide variety of equipment and processes, including most machine tools from the simplest lathe to complex electrical-chemical milling, and electron-beam welding. They commonly achieve tolerances to one ten-thousandth of an inch and regularly use computers as an aid in design, machining, and control of operations.

The tooling and machining industry is the cornerstone of modern mass production. The 14,000 companies in the industry serve virtually every other industry in the nation, from automotive to aerospace. Without the services of these thousands of highly competitive small companies mass production would not exist.

NTMA member companies are ready, willing and able to provide DoD with high quality spare parts at a fraction of prices presently paid and with materially shorter lead times. However, they have been repeatedly precluded from bidding because the Government has incomplete data or because of prime contractor claims to rights in data.

Less than 10% of the approximately \$19.5 billion spent by the DoD on spare parts is awarded through open competition. Considering that costs savings of almost one-half have repeatedly been documented when spare parts contracts are openly competed the need for Government ownership of data rights is obvious.

At the outset we note the difficult position in which the DAR Council is placed by recent legislative developments.

It made no sense for Congress in section 953 of P.L. 99-500 to weaken the rule requiring complete development at private expense at a time when technical data problems remain the greatest barrier to competitive spare parts contracts. For example the Air Force Logistics Command has screened 255,420 of the 873,420 parts in its inventory for possible competitive procurement and determined that not even restricted competition could be used to purchase 147,682 parts. Of these totally noncompetitive procurements, 73.5% were caused by data problems. More specifically, 34,545 parts or 23.4% of the noncompetitive purchases were because of proprietary claims, 28,791 parts or 19.5% were because there was no technical data in the Government's possession and 45,304 or 30.6% resulted from incomplete data. It would appear that about 50% of these dollars spent without even restricted competition were caused by proprietary claims since proprietary claims are the cause of most incomplete data situations.®

® AFLC Summary for Fiscal Year 1985. A 1984 Report of the OSD Technical Data Study Group entitled "WHO SHOULD OWN DATA RIGHTS: GOVERNMENT OR INDUSTRY?" is cited for the proposition that only 4.1% of the parts in DoD's spare parts inventory are purchased noncompetitively because of proprietary claims. This figure is misleading for several reasons. First, in arriving at this figure the Study Group did not include the 26.7% of the parts which are coded "H" for incomplete data. As indicated by Oklahoma City Air Logistics Center Competition Advocate John Schultz, most incomplete data situations involve proprietary claims. Second, by considering the entire DoD spare parts inventory, jet engine parts are considered the same as nuts and bolts which obviously are not proprietary. A better measure of the impact of proprietary claims on competitive procurement would be to consider the dollar value under each procurement code. Finally, the study does not consider the numerous cases where proprietary claims cause competition to be restricted to approved sources, e.g.- a prime and its economically dependent subcontractor.

In addition, virtually all technical data is received for competitive review more than three years after final payment or delivery of the data. It clearly makes no sense to devote manpower to reviewing data rights until it is known what spares are needed. It is also clear that the DoD does not have the resources to review data rights claims in the limited time now permitted.

We recognize that these are points for Congressional rather than regulatory action. However within the Congressional constraints of P.L. 99-500 and P.L. 100-180 we believe there is room for improvement in the proposed regulation.

Our comments are set forth below after a background discussion concerning the evolution of DoD data rules and what is needed by small businesses to compete for spare contracts. A complete understanding of what is needed for small businesses to compete is essential because this rule should not place more barriers than those mandated by P.L. 98-525 to those small businesses attempting to compete for DoD spare parts contracts and licensed foreign requirements.

I. Background

A. Historical Perspective

1. Rules Promulgated by DoD in 1964

The basic rules concerning the acquisition of technical data were promulgated by DoD in May 1964 in Defense Procurement Circular 6 and remained essentially unchanged until the recent enactment of Public Law 99-500. In order for a contractor to properly affix a limited rights legend to technical data under this longstanding rule, the data must pertain to an item, component or process that was (1) a trade secret (2) developed (3) at private expense.

"Developed" was interpreted as meaning brought to at or near the point of practical application. In order for an item to have been considered as developed at private expense all development was required to have been at private expense. In other words, if the development of an item was funded with a mixture of Government and private funds, the Government obtained unlimited rights in data.

Standard clauses have long required a contractor to substantiate its claims to rights in data by clear and convincing evidence for as long as it asserted them.

2. The Defense Procurement Reform Act of 1984

Congress enacted the Defense Procurement Reform Act of 1984 as part of the FY1985 DoD Authorization Act, P.L. 98-525. The Act resulted from the immense cost to the taxpayer of noncompetitive spare parts procurements, many of which resulted

from spurious contractor claims to rights in data. P.L. 98-525 added 10 U.S.C. 2320 and 2321 which are respectively entitled "Rights in technical data" and "Validation of proprietary restrictions" to the Armed Services Procurement Act.

10 U.S.C. 2320 (a) required the promulgation of regulations defining legitimate proprietary interest. For the first time 10 U.S.C. 2321 provided a statutory mechanism for challenging contractor proprietary claims.

DoD proposed rules to implement P. L. 98-525 in the Federal Register of September 10, 1985. Just as the regulations promulgated by DoD in 1964, the regulations proposed under Public Law 98-525 would have permitted limited rights legends only to be placed on technical data for items developed completely at private expense. Those proposed regulations followed the interpretation of then existing rules. In order to be considered as developed at private expense under the 1985 proposed regulation, an item would have had to have been brought to the point of practical application. The proposed rules also required "completed development ... without direct Government payment" in order for a contractor to claim proprietary rights. This was consistent with the requirement that an item be brought to the point of practical application in order to be patentable and restated the rule under which the Government obtained unlimited rights when development was accomplished with a mixture of Government and private funds.

NTMA was generally pleased with the proposed implementation of the technical data provisions contained in P.L. 98-525 and 98-577. As stated in our October 1, 1985 comments "It is to the credit of the Defense Acquisition Regulatory Council that these proposed regulations show an inclination to protect the taxpayers interest."

The regulation proposed under P.L. 98-525 was opposed by contractors intent on using the Competition in Contracting Act as a vehicle to increase their rights in data rather than competition. DoD officials publicly stated that they had no intention to use the Competition legislation rules to abolish the requirement of complete development at private expense in order for a contractor to obtain rights in data. The regulation was never promulgated in final form.

3. FY 1987 Defense Authorization Act "Technical Amendments"

Thwarted by the P.L. 98-525 rulemaking proceedings, lobbyists for large defense contractors accomplished their objectives through the enactment of purported technical amendments in the FY 1987 Defense Authorization Act, P.L. 99-500. These provisions materially weakened the DoD's ability to obtain rights in technical data needed for competitive procurement.

Not surprisingly this legislative attack on the taxpayers' interest was enacted without the benefit of public hearings. On the House side it was added in markup in a provision described to members as a "technical amendment". On the Senate side it was enacted as the result of a floor amendment.

The Rights in Technical Data provisions enacted in Public Law 99-500 constituted the most drastic change in DoD data policy since Defense Procurement Circular 6, which provides the basis for current rules, was promulgated by DoD in 1964. The P.L. 99-500 data rules are inconsistent with the P.L. 98-525 remedial measures enacted by Congress to reduce DoD's reliance on costly, noncompetitive spare parts contracts. More specifically, P.L. 99-500 weakens the Government's position with respect to contractor rights in data in two significant areas.

First, contrary to long established precedent, data rights are left up to negotiations where development results from a mixture of Government and contractor funding. As previously noted, under long-standing interpretations, the Government previously obtained unlimited rights to use such data for competitive procurement.

Second, P.L. 99-500 for the first time places a time limit on the Government's right to challenge contractor data rights claims.

Public Law 99-500 was silent as to the standard of proof necessary to justify claims to rights in data. However, at the behest of large aerospace contractors, DoD reduced the standard of proof necessary to support claims to rights in data from "clear and convincing evidence" to "sufficient evidence."

4. Executive Order 12591

On April 10, 1987, President Reagan issued Executive Order 12591 entitled, "Facilitating Access to Science and Technology." Section 1.(b)(1) of the Executive Order requires Federal agencies, "to the extent permitted by law", to "cooperate, under guidance provided by the heads of other affected departments and agencies in the development of a uniform policy permitting Federal contractors to retain rights to software, engineering drawings and other technical data generated by Federal grants and contracts, in exchange for the royalty-free use by or on behalf of the Government.

5. The FY 1988 Defense Authorization Act

Additional data rights provisions appeared in the Fiscal Year 1988, Defense Authorization Act, P.L. 100-180, section 808. More specifically, 10 U.S.C. 2320 was amended to provide as follows:

-all indirect costs paid for by the Government will be treated as "private expense";

-contractors cannot be barred from using items, components or processes developed at private expense;

-a contractor may not be barred from receiving a fee from a third party for the use of data relating to items, components or processes developed at private expense;

-DoD may achieve competition by contracting for the direct licensing of alternate sources;

-rights in mixed funding data are required to be negotiated except where a determination is made that negotiation is impracticable;

-DoD is to issue rules for negotiating rights in data.

DoD issued interim rules implementing these statutory provisions on April 1, 1988 in order to comply with the Congressional deadline to issue implementing regulations.

B. DoD Can Save Billions Through Competition

About 90% of DoD spare parts are coded for noncompetitive procurement or for procurement through restricted competition. The dollar value of DoD spare parts purchased through open competition is much less than the 10% of the parts purchased using open competition since the 10% figure represents mostly low dollar items.

Studies have shown repeatedly that DoD saves almost 50% when parts are openly competed. There is a potential for savings billions of dollars since DoD purchases approximately \$19.5 billion in spare parts annually.

C. What Small Businesses Need to Compete

Small businesses are ready, willing and able to provide high quality spare parts at a fraction of the prices presently paid and with materially shorter lead times. However they are prevented from doing so by noncompetitive DoD practices. Small businesses do not need set-asides to compete since they invariably win out over original equipment manufacturers when allowed to compete. Small businesses need just three things to compete: (1) timely notification of procurement opportunities, (2) timely access to adequate technical data and (3) engineering source approval based on engineering principles rather than bureaucratic whim. A brief description of each of these items is provided below.

1. Notification of Procurement Opportunities

Since small businesses cannot afford on-site representation at procurement activities they are forced to rely upon the Commerce Business Daily to learn of procurement opportunities.

However, problems often occur because an item is not synopsized in the CBD or, not timely synopsized, or the synopsis is misleading.

Despite the enactment of P.L. 98-72 and 98-369, CBD synopses continue to be a barrier to competition. All too often purchases are not synopsized because of purported "urgency". Noncompetitive procurements also occur because synopses which are presumed to have been made by regulation have not been made. See FAR 5.203(f). Also impeding competition is an Air Force regulation providing that only six items need be synopsized if multiple items are purchased in one contract. AF FARS 5.207 (b)(4)(iii).

2. Timely Access to Technical Data

After locating a contracting opportunity in the Commerce Business Daily, small businesses request a copy of the solicitation from the procuring activity. However, all too often they will be told that none can be provided because the supply is exhausted. This practice exists despite the fact the law (15 U.S.C. 637b) requires that small businesses be given a copy of bid sets and specifications upon request.

Even if a small business is fortunate enough to timely obtain a solicitation, it often will not contain the government owned technical data needed to manufacture the contract end item. This practice may be seen in solicitations for the 90% of DoD spare parts assigned restrictive procurement method codes. For these DoD spare parts contracts potential bidders are referred to DoD data repositories to obtain the Government owned data needed for bidding. These requests are made by small businesses under the Freedom of Information Act (FOIA).

The problem with DoD data repositories is that although the bidding period is normally just thirty days, the repositories take much longer to respond to data requests. For example the Navy often takes a year to respond to data requests and the Air Force several months. In order to obtain technical data in time to bid many small businesses rely on commercial data brokers. These data brokers facilitate competition by making data available to would be bidders by overnight mail.

When the DoD data repositories do respond they will often not provide data because it contains a limited rights (proprietary) legend. In the past many prime contractors routinely marked items as proprietary even if they were not because proprietary claims were never challenged. Small businesses have successfully used the FOIA to remove thousands of prime contractor proprietary legends.

3. Engineering Source Approval

Prequalification is a major impediment to small business participation in the procurement process. The military argues that prequalification is necessary to assure that quality end items are received. However, prequalification is a costly, ineffective quality control technique. Prequalification provides no assurance that a quality end item will be received and only restricts competition, often to just one source. True quality control cannot be achieved through qualified bidders or products lists, but only through recognized quality control techniques such as management, regular instrument calibration, good specifications and conformance testing.

Prequalification requirements are often adopted by DoD as a result of a recommendation from the very large defense systems manufacturers that benefit from a noncompetitive procurement. The most frequent rationale is that unique manufacturing capabilities are needed. This argument is dubious since the large prime contractor recommending prequalification most often does not manufacture the part in question, but subcontracts it to one or more small business concerns. Often DoD tells small businesses which wish to prequalify to obtain engineering approval from the large defense systems manufacturer they wish to bid against. This is a commercially impracticable requirement.

II. The Proposed Rules Implementing Public Law 100-180

A. Government Purpose License Rights

The regulations extend the potential application of "government purpose license rights" to those items developed entirely at Government expense. "Government purpose license rights" give the Government the right to use, duplicate, or disclose technical data for Government purposes only and to have or permit others to do so for Government purposes only. Under the proposed regulation, government purposes include use by the government for a competitive procurement.

1. Government Purpose License Rights Should Include Release to Potential Bidders on DoD and Licensed Foreign Requirements Before a Solicitation is Issued

If the Government purpose license rights concept is retained, the definition of Government purpose should expressly include the right to provide such data to potential bidders on DoD contracts and licensed foreign military requirements even if no solicitation has been issued. The regulations should make it clear that access is available to would be bidders as a right under the FOIA and 15 U.S.C. 637b which provides that small businesses shall be provided bid sets and specifications upon request. The regulations should also provide that data subject

to Government purpose license rights be included in solicitations. For the reasons previously discussed, this alone does not assure access in time to bid.

2. Government Purpose License Rights Should Include Right to Release to Commercial Technical Data Services for Sale to Potential Bidders

The definition of Government purpose license rights in DFARS 227.471 is limited to the right to use, duplicate or disclose for Government purposes and "the right to have or or permit others to do so for Government purposes only." The right to have others to do so should expressly include the right to make data available to commercial technical data services for sale to would be bidders on DoD contracts and licensed foreign requirements.

This clarification is necessary because of the inefficiency of DoD data repositories make commercial technical data services an essential part of the procurement system. As noted previously, in order to compete and obtain required engineering source approvals, small businesses need access to data before a solicitation is issued. In addition although the bidding period is normally just 30 days data cannot be accessed from DoD data repositories during this period. In contrast commercial technical data services provide data on an overnight basis.

In order to avoid any misunderstanding by those implementing the regulations, it should be made clear that technical data services are entitled to Government purpose license data as a matter of right under the Freedom of Information Act and 15 U.S.C. 637b.

3. Nondisclosure Agreements

Even absent additional bureaucratic entanglements, DoD data repositories are unable to provide data in time to bid. Rather than attempting to resolve this barrier to competition, Congress and DoD continue to come up with additional barriers to the prompt dissemination of bidding data.

A recently enacted unintended barrier to prompt dissemination of bidding data is section 913 of the FY 1984 Defense Authorization Act. This provision, which is codified at 10 U.S.C. 130c, gives DoD the authority to withhold from public disclosure certain data subject to export control. DoD Directive 5230.25, which implements 10 U.S.C. 130c, requires contractors to become certified U.S. contractors in order to obtain data.

DoD routinely uses DoD Directive 5230.25 to withhold data -- even from firms that have gone through the mandated process of becoming certified U.S. contractors. When requests are received, prolonged delays occur while DoD attempts to

determine if data is subject to Directive 5230.25 and if so whether it is within the scope of a firm's certification statement.

The DAR Council is to be commended for providing in section 227.473-1(c)(2) of the interim DFARS for the use of standard nondisclosure agreements where Government purpose license rights are obtained. Under prior rules, the terms of nondisclosure agreements were left to the unbridled discretion of original equipment manufacturers, which stand to benefit when such data is unavailable to potential competitors.

However, the nondisclosure agreement provisions set forth in the proposed technical data regulation still add one more bureaucratic impediment to the release of bidding data. Such an agreement seems to be required to be executed each time a contractor obtains Government purpose license rights data.

In order to facilitate prompt release of bidding data we strongly recommend that any such agreement be limited to a master agreement with the Government covering all Government purpose license rights data, rather than serving as an impediment to obtaining data needed for bidding each time a request is made. The execution of such an agreement should be coordinated with a firm's registration under DoD Directive 5230.25 as a certified U.S. contractor.

Potential bidders on DoD contracts and licensed foreign requirements, as well as commercial technical data services, should be permitted to enter into such agreements.

For the reasons previously noted, it is essential such agreements provide for pre-solicitation access to government purpose license rights data to potential bidders on future DoD contracts and licensed foreign military requirements. Such access should be available under the Freedom of Information Act and 15 U.S.C. 637b.

4. Alternate Approach to Nondisclosure Agreements

The DAR Council has requested comments on a possible alternative approach to non-disclosure agreements. Under the proposed alternative approach a solicitation provision would notify offerors that a solicitation contains technical data subject to restrictions on further use and disclosure and would require offerors to safeguard the data which would be marked with appropriate restrictions.

The provision fails to recognize the need of small businesses to obtain technical data before a solicitation is issued in order to compete. This need has been previously discussed at length. For this reason NTMA would prefer a one time execution of a standard agreement that covers all Government purpose rights data that a contractor requests in the future.

B. The Clear and Convincing Evidence Standard Should be Restored

Interim DFARS section 227.447-4 (c) provides that restrictions on the Government's rights in data can be challenged by the contracting officer in accordance with the procedures set forth in the clause appearing at DFARS 252.227-707. This clause permits the Government to require a contractor to provide "sufficient evidence" to justify its proprietary claim.

Prior to the promulgation of rules implementing P.L. 99-500, the standard of proof set forth in regulations dating back to 1964 is "clear and convincing evidence." There is no indication in the legislative history that Congress intended to modify the longstanding clear and convincing evidence standard.

The requirement that contractors justify data rights by clear and convincing evidence is necessary because all facts needed to justify claims to rights in data are in the possession of the contractor claiming rights in data.

The clear and convincing evidence test should also be retained to prevent confusion. The sufficiency standard is unduly vague. "Clear and convincing evidence" is an established legal standard. There is no established legal definition of "sufficient" legal evidence.

C. Validation of Restrictive Markings

Section 227.473-4 sets forth procedures for restrictive markings. Our recommendations with respect to this section are as follows:

1. The Statutory Provision Requiring a "Thorough" Review of Rights in Data While DoD Has the Right Should Be Implemented

Public Law 99-500 drastically departed from prior law for the first time by placing a time limitation on the Government's right to challenge contractor claims to rights in data. The time limitation is the later of three years after final payment or delivery of the data. Previously the Government could challenge contractor data rights claims for as long as they were asserted.

In order to assure that the taxpayer's rights are protected the legislation required the Secretary of Defense to assure "a thorough review" within this period of "the right of the United States to release or disclose technical data delivered under a contract to persons outside the Government, or to permit the use of such technical data by such persons." This review requirement clearly applies to Government purpose license rights claims as well as limited rights claims since they impinge on the Government's right to make data available to persons outside the Government.

Although the interim regulation requires that a "review" be made within the statutory period, it should also require that such a review be "thorough", as required by statute.

2. The Prechallenge Review Procedure Should be Made Optional with the Contracting Officer

Interim DFARS 27.473-4(b)(1) provides that the "formal" data rights challenge provisions may be invoked only after the contracting officer requests information concerning rights in data from the contractor and any interested Government activities. This procedure would unnecessarily delay the removal of improper claims of rights in data since it appears to require the contracting officer to go through the pre-challenge review procedures even where he already has probable cause to challenge a contractor's proprietary claim. This provision, which is not a part of the statute being implemented, is not in the Government's best interest and should be eliminated.

3. Limitations on the Government's Right to Use Data After a Contracting Officers Decision Removing Restrictive Legends Should Be Eliminated

The proposed regulation provides that the Government will not use data even after a contracting officer decision removing restrictive legends if either a contractor within 90 days (1) appeals to the Board of Contract Appeals or (2) indicates it will appeal to the U.S. Claims Court within one year. After a suit is filed it provides that the data will not be used for competitive procurement until a final decision is issued.

These provisions, which do not appear in either Public Law 98-525 or 98-577, would allow a contractor to delay having to face competition indefinitely and should be eliminated. Although the proposed regulations provide the data can be used upon a finding of "urgent or compelling circumstances" by the head of the agency in practice this is of little practical value to a contracting officer.

Under the proposed regulations it would be to a contractor's advantage in every instance to indicate it would file suit in the U.S. Claims Court within one year. Even if suit is never filed it delays release of data for one year without any penalty.

If suit is filed it can easily take years for a decision on the merits. Technical data litigation has in the past been characterized by repeated requests for extensions by contractors. It also should be noted that a Board of Contract Appeals or U.S. Claims Court decision is not final until any appeal to the U.S. Court of Appeals for the Federal Circuit is decided.

These provisions give the contracting officer less power to challenge claims to rights in data than that available to members of the public under the Freedom of Information Act. Under the

FOIA the Government is required to promptly release data absent adequate justification for any proprietary claims.

If the validation provisions were promulgated in their present form a contracting officer desiring to challenge questionable data rights claims would be better off submitting an FOIA request for the data. This is obviously not what Congress intended when it enacted Public Laws 98-525 and 98-577.

It also should be noted that these provisions are not necessary to provide a contractor with an adequate remedy at law. If a contracting officer decision removing a restrictive legend is overturned a contractor is entitled to recover damages for any pecuniary loss.

D. Developed Exclusively at Private Expense

As previously noted in order for a contractor to be automatically entitled to claim limited rights in data an item must be "developed exclusively at private expense." DFARS 227.471 defines "developed" as meaning that "the item component, or process exists and is workable." The interim regulation further states that "Workability is generally established when the item, component or process has been analyzed and or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended." This is less stringent than the standard of "brought to the point of practical application" set forth in the proposed regulations implementing Public Law 98-525, which was bitterly fought by large aerospace contractors.

We strongly urge the DAR Council to adopt its earlier proposed formulation. There is no statutory basis for the DAR Council's change in position. The formulation in the earlier proposed regulation is consistent with the requirement that an item be brought to the point of practical application in order to be patentable. The reduction to practice requirement is necessary to protect the taxpayer since few ideas ever reach the patent stage, and of those that do, only few achieve market acceptance which is the only true measure of their value.

We recognize that the formulation appearing in the proposed regulation appears in the Conference Report for the FY 1987 Defense Authorization Act, P.L. 99-500. See "National Defense Authorization Act for Fiscal Year 1987: Conference Report to Accompany S.2638", H. REP 99-1001, 99th Cong. 2d. Sess at 511 (1986). However, the formulation set forth in the Conference Report cannot be said to evidence Congressional intent for several reasons.

First, Public Law 99-500 contained no new provisions concerning the definition of "developed". The requirement to define "developed" came from Public Law 98-525 which was enacted to increase competition rather than increase contractor rights in data;

Second, the gratuitous language appearing in the Conference Report can hardly be said to reflect Congressional intent since the technical data provisions in Public Law 99-500 were enacted without the benefit of public hearings;

Finally, the language in the Conference Report is taken from the decision of the Armed Services Board of Contract Appeals in Bell Helicopter Textron, ASBCA No. 21192, 85-3 BCA 18,415 (1985). The language is what is known as dictum since it was not necessary for the Board's decision. Dictum is not binding legal precedent.

If the definition in the interim regulation is retained, the language "there is a high probability" should be deleted from the definition. As is, the definition defies logic. An item, component or process is "workable" if it is shown that it in fact works -- not that there is a "high probability" that it will work.

III. Other Matters

We would like to briefly suggest some additional initiatives to enhance competition.

A. Modify DFARS Supplement No. 6 to Provide for Generic Qualification of Spare Parts Manufacturers

Under current procedures for qualifying sources to manufacture critical parts a contractor generally must have made a part before in order to be approved as a source. This requirement often limits "competition" to subcontractors which have made a part for a prime contractor.

Only DoD procures in this manner which is akin to limiting a contract for a painting of a particular mountain to only artists which have painted a picture of such mountain in the past. DoD should, as in the private sector, qualify new sources on a generic as opposed to a part by part basis.

B. Require the Use of Commercial Source Approval Standards

The standard for commercial use of spare parts is FAA Parts Manufacturing Approval (FAA/PMA approval). FAA/PMA approval is based on identity with the part manufactured by the Original Equipment Manufacturer. FAA/PMA parts have proven to be safe and reliable in operation. See, PART MANUFACTURERS APPROVAL PROGRAM EVALUATION: Phase I Report, Prepared for U.S. Department of Transportation by COMSIS (December 1984).

Despite the fact that a vendor has extensive commercial and foreign military sales and FAA/PMA approval DoD often refuses to buy from them. The purported reason is that the part in question does not meet the DoD's engineering source approval standards which for the most part are nonexistent.

There is no reason to require more than FAA/PMA approval. Requiring the acceptance of FAA/PMA parts would materially increase competition and is consistent with recent rules requiring the acceptance of commercial products.

C. Eliminate the Presumption of CBD Synopsis for DoD Procurements

In enacting Public Laws 98-72 and 98-369, Congress required that a solicitation not be issued until 15 days after synopsis in the Commerce Business Daily and that a solicitation remain open for at least 30 days. This legislation was necessary in order to assure that small businesses obtain bid sets in time to bid. Congress undoubtedly meant actual synopsis as opposed to presumed synopsis.

However, FAR 5.203 permits a contracting officer to presume a requirement is synopsisized ten days after it is transmitted to the Department of Commerce. This provision has been found to be contrary to law by GAO. AUL Instruments, Inc., 64 Comp. Gen. 871, 85-2 CPD 324 (1985).

Despite the GAO ruling this provision continues to result in requirements not being synopsisized or synopsisized too late. Rather than follow the GAO decision and Congressional mandate, rulemakers sanctioned business as usual by revising the regulation to state that the presumption of synopsis was inapplicable if a contracting officer had evidence that a requirement was not synopsisized.

This approach defies logic. Contracting officers claim they do not have time to see that a synopsis has been published in a timely fashion. Therefore the only way they can obtain such information is from a potential source. However if a synopsis is not published a potential source won't see it and cannot tell the contracting officer it was never published.

The DAR Council should urge the FAR Council to repeal this provision while promulgating a DoD rule that complies with Public Laws 98-72 and 98-369.

D. Improve Information Provided in Commerce Business Daily Synopsis

DoD repeatedly complains that they are forced to send out too many bid sets and therefore need to charge for bid sets. At the same time our members tell us that because of inadequate CBD synopsis they are forced to request bid sets for items they ultimately determine they are not interested in. The obvious best solution for all concerned is to improve CBD synopsis to enable firms to be more selective in the bid sets they request. We would be happy to work with you on this.

E. Permit Bid Sets to Be Requested by Telephone

DoD often does not get bid sets to would be bidders in time to bid. Part of this delay is caused by contracting officers requiring a written request for a solicitation. DoD regulations should be modified to allow requests to be made by telephone.


F. Require Technical Data to Be Included in all Solicitations

Delays and problems in responding to solicitation occur because Government-owned technical data is not included in bid sets for spare parts contracts. This frustrates competition because it often takes six months to get technical data from DoD data repositories. The obvious solution is to require by regulation that bid sets contain Government-owned technical data.

CONCLUSION

NTMA very much appreciates the opportunity to submit these comments. If you have any questions, or if we can be of further assistance, please let us know.

Sincerely,


Matthew B. Coffey
President

Case Management Record

87-503
EXOC. SEC.

DAR Case No. 87-303	CAAC No.	Original Updated	Date 5/19/88
Title <i>Technical Data</i>			
Reference			
Synopsis <i>Additional Comment (problem statement)</i>			
Priority	Submitted By	Originator Code	Case Manager
Keywords			
Case References			
FAR Cites			
DFARS Cites			
Cognizant Committees			
Recommendation			
Notes			



Electronic Data Systems Corporation
6430 Rockledge Drive
P.O. Box 34269
Bethesda, Maryland 20817
(301) 564-3200

May 16, 1988

Defense Acquisition Regulatory Council
Attn: Mr. Charles W. Lloyd
Executive Secretary
ODASD(P) DARS. c/o OASD (P&L) (MRS) Room 3D139
The Pentagon
Washington, D.C. 20301-3062

Subject: DAR Case 87-303

Dear Mr. Lloyd:

Not long ago, Mr. Summerhour and John Lawther from EDS Corporation discussed at length one of the problems which industry is having with Technical Rights in Data. Mr. Summerhour suggested that we submit comments to you with the understanding that Mr. Summerhour and his committee would review said comments and perhaps address them in a future DFAR or FAR.

DFAR Subparts 227.472-3 (a) (iv), and 252,227-7013 (b) (iv) and FAR 52.227-7013 (b) (iv) are causing substantial problems with many of our vendors. EDS, as an integrator, works with many companies in order to come up with the best solution at the lowest overall cost in responding to RFPs. The above mentioned clauses create a great deal of concern as they require unlimited rights for "Manuals or instructional materials...prepared or required to be delivered under this or any other contract or any subcontract hereunder necessary for installation, operation, maintenance, or training purposes."

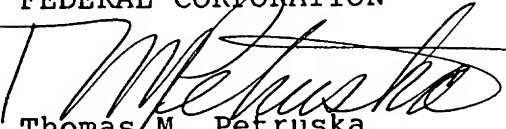
Even if this technical data is copyrighted, the contractor has to grant to the Government is nonexclusive, paid-up license throughout the world to use, copy, and distribute the material as authorized by the clauses.

Many vendors spend a great deal of money on this technical data which the Government has said must be provided with unlimited rights. In many instances, this data means a significant amount of revenue to the vendors. In fact, in some cases, e.g. training, it can mean the total revenue for a particular company and the vendor must be able to protect the competitive edge provided by its products. In any event, vendors generally refuse to give unlimited rights to this type of data. Their position is that this technical data is copyrighted and normal copyright laws should apply. In addition, almost all vendors take the position that granting to the Government a nonexclusive, paidup license throughout the world does great harm to their companies. For example, it can't be priced in many instances. Take for an example an agency who has solicitation for one (or more) computer systems. The prices for a Government paidup license could be more costly then the computer system(s).

Vendors have strongly suggested that if the Government require this type of copyrighted technical data, the Government should order such data from the vendor at the price listed in their catalog. All of the technical data in issue has been developed at private expense and would be a catalog offering with prices which are sold generally in the commercial marketplace.

EDS' position is that the Government should adopt the vendors suggestion as it would, among other things, eliminate a strong barrier for contractors to make such Non-Development Items (NDI)/Commercial technical data available to the Government.

Very truly yours,
ELECTRONIC DATA SYSTEMS
FEDERAL CORPORATION



Thomas M. Petruska
Manager
Policy and Reviews

TMP:srk

cc: John Lawther
Rick Summerhour

Case Management Record

DAR Case No. 87-303	CAAC No.	Original Updated	<input checked="" type="checkbox"/>	Date 20 June '88
Title Technical Data				
Reference				
Synopsis Additional Public Comments				
Priority	Submitted By	Originator Code	Case Manager	
Keywords				
Case References				
FAR Cites				
DFARS Cites				
Cognizant Committees				
Recommendation				
Notes				



THE OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-8000

PRODUCTION AND
LOGISTICS

P/CPA

87-303

Mr. Earl T. Steiner
8165 Woodlawn Drive
Piqua, Ohio 45356

Dear Mr. Steiner:

This is in reply to your recent letter to the Assistant Secretary of Defense (Production and Logistics) concerning Department of Defense (DoD) policy for the acquisition of data. The Defense Acquisition Regulatory (DAR) Council is now considering public comments on proposed changes to the DoD regulations concerning acquisition of technical data. I have provided the Director of the DAR Council with a copy of your letter.

We appreciate your interest in this matter.

Sincerely,

Alfred G. Volkman

Alfred G. Volkman
Director, Contract
Policy and Administration

8165 Woodlawn Dr.
Piqua, Ohio 45356
4 June 1988

Hon. Jack Katzen
Under Sec. of Defense
Production & Logistics
Pentagon
Washington, DC 20301

Dear Mr. Katzen,

I am sending you the enclosed as any citizen has a right. I am doing it out of utter frustration. I have worked in contracting for 22 years and I have always tried to follow the rules and regulations. It is impossible to follow those for the acquisition of data and particularly software.

I wrote the enclosed article to try to relieve myself of some of the frustration.

Sincerely yours,
Earl T. Steiner.

AQ000206788

The Dilemma of a Department of Defense Data Buyer

Pity the poor buyer in the Department of Defense (DOD) when he is to acquire data. With seven exceptions, he can not acquire this data and fully comply with the guidance in the Federal Acquisition Regulation (FAR) as supplemented. Even worse, if the data to be acquired is software specifically developed for the Government, he finds that there is a conflict between these regulations and public law.

Data, as defined in the FAR and its supplements, means recorded information regardless of form or method of recording. Technical data means recorded information, regardless of the form or method of recording, of a scientific or technical nature (including computer software documentation). Such term does not include computer software or data incidental to contract administration, such as financial and/or management information. Thus technical data is defined; it is assumed that all other data is non-technical data. There is a problem here that was brought about by Public Law 98-94. This public law added to 10 USC 140c the following paragraph (b)(2): "In this section, 'technical data with military or space application' means any blueprints, drawings, plans, instructions, computer software and documentation, or other technical information that can be used, or be adapted for use, to design, engineer, produce, manufacture, operate, repair, overhaul, or reproduce any military or space equipment or technology concerning such equipment." The normal assumption is that public law supercedes any Government regulation, but so far DOD has not recognized this by a change to its supplement to the FAR.

Most of the guidance the DOD buyer must follow is found in the DOD FAR Supplement (DFARS). Normally when data delivery is required under a contract it must be listed on a DD Form 1423, Contract Data Requirements List. There are seven exceptions to this requirement and they are set forth in DFARS paragraph 27.475-1. It is only when one of these exceptions apply that the buyer can fully comply with the regulatory and legal guidance. When none of the seven exceptions apply and data is required, the contracting officer must insert the DFARS clause number 52.227-7031, Data Requirements, in the contract. This clause states that the contractor is required to deliver only the data items listed on the DD Form 1423 and the data items identified in and deliverable under any other clause in FAR and DFARS made a part of the contract. The requirement for delivery of any data items under the contract can be established only by listing the data items on the DD Form 1423.

The problem to the DOD buyer comes when he tries to translate the DFARS guidance into the requirements of a contract. DFARS paragraph 15.406-2 states that when a DD Form 1423 is used to list technical data which is to be delivered under the contract, and none of the seven exceptions apply, the DD Form 1423 shall be designated as an exhibit and established as such in accordance with DFARS Section 4.7105. That seems plain and apparently it does not apply to non-technical data. The pertinent parts of this section state:

(1) "'Exhibit' means a document attached to a procurement instrument, referenced by its capital letter identifier in a line or subline item in the procurement instrument Schedule, which establishes deliverable requirements".

(2) "Each exhibit shall apply to one contract line or subline item".

(3) "The term 'Exhibit' shall not be used to identify any other attachment to a procurement instrument. When contract line items or subline items refer to a document attached to a procurement instrument which establishes a deliverable requirement, such spare parts or data on a DD Form 1423, this document shall be termed an Exhibit. When other types of documentation are appended to or incorporated by reference in a procurement instrument, such documentation shall be referred to as an 'Attachment' or other term identifying it as appended documentation. Such documentation may be attached to a contract exhibit provided such documentation does not identify a deliverable requirement which is not established by a contract or exhibit line or subline item."

(4) "DD Form 1423 --- may be used as an exhibit or as an attachment." If the DD Form 1423 is used as an attachment "a separate contract line item or subline item shall be established in the schedule for, and which references, each deliverable sequence number on the DD Form 1423".

(5) "Contract line or subline items in the schedule which reference an exhibit shall not contain unit prices or total amounts, except when necessary to reflect the amount of funds for actual or estimated requirements to satisfy the management needs of the individual procuring activity. When unit prices or total amounts are shown to satisfy a management need, such prices or amounts shall be set forth in parentheses within the item description block of the contractual document (i.e., not within the unit price or amount columns)".

In short what has been established so far is that, if technical data is being acquired it must be on a DD Form 1423, and that form is to be designated an exhibit in accordance with Section 4.7105 in DFARS. This exhibit must be identified by an alpha character and referenced in only one line or subline item. The DFARS clause "Data Requirements" says that the only way the contractor can be required to deliver data is by putting the data on a DD Form 1423. DFARS Section 4.7105 states that whenever a delivery requirement is established for data on a DD Form 1423 it shall be termed an exhibit. The Section also states that the DD Form 1423 may be used as an attachment. Why would data be listed in the contract if it is not deliverable? Why would DOD pay for data that wasn't to be delivered? The word deliverable is a little misleading; it actually refers to data that is an end item of the contract. Non-technical data is not usually an end item of the contract. We do not write a contract for the purpose of receiving such information as administrative data, reports of maintenance action, minutes of meetings, or the funds expended at different stages of contract completion. When a DD Form 1423 is used as an attachment, the price of the data is set forth in a line or subline item that references a sequence number on the DD Form 1423. If it is technical data or deliverable non-technical data (i.e. an end item of the contract), the DD Form 1423 must be designated an exhibit and treated as such.

It is all so simple with technical data. It is listed on a DD Form 1423 and the DD Form 1423 is an exhibit attached to a line or subline item that does not contain prices. The prices are in the exhibit, but where on a DD Form 1423 is there a place for prices? A simple solution is to ignore all the above and follow the guidance in DFARS Section 15.871. This states that "the solicitation shall include priced line item for that data". It is impossible to comply with both DFARS Section 15.871 (do not put prices in the exhibit, but reference the exhibit in a priced line item) and DFARS Section 4.7105 (the line item referencing the exhibit does not contain prices but the exhibit does) at the same time.

AFFARS 15.871 adds some other complications to acquiring data. It contains the ground rules for determining when it is not practical to separately price data, and that the cost of the data is included in some other line item. DOD has consistently sought to identify the cost of data to see if the benefits derived from the data are worth the cost. The easiest time to require that the contractor separately price data is during competition, but that is one of the excuses for not doing it. When the instructions on the back of the DD Form 1423 are followed, there is a good basis to decide if the cost of the data is basically an indirect or direct cost to the contract. This should be the deciding factor. The DD Form 1423 requires the contractor to group the data in four different categories.

(1) Group I data "is not otherwise essential to the contractor's performance --- but which is required" by the the DD Form 1423.

(2) Group II data "is essential to the performance of the primary contracted effort but the contractor is required to perform additional work to conform to the Government requirements".

(3) Group III data is "data which the contractor must develop for his internal use in performance of the primary contracted effort and does not require substantial change to conform to Government requirements".

(4) Group IV data "is developed by the contractor as part of the normal operating procedure and the effort in supplying these data to the Government is minimal".

The cost of data to be separately priced in the contract is the cost of producing and delivering the data above and beyond the cost of otherwise performing the contract. The definitions as presented above are not complete, but they serve to demonstrate that only Group IV data should routinely be not separately priced; Group I data should almost always be separately priced; and in Groups II and III the additional effort should be separately priced. All too often contracting officers find this effort too much trouble. This happens even when the contractor clearly defines in his proposal the cost of the data.

Software specifically prepared for delivery to the Government does not really fit any of the above four categories. The guidance established for buying data assumes that the data was developed in conjunction with the development of some system, such as an airplane or radio. Under this assumption, the purpose of the contract is not the delivery of data as such, but the delivery of a system and its supporting data. The airplane will be usable even without the data. There is no guidance for the acquisition of data when the purpose of the contract is the delivery of that data. The purpose of the contract cannot be fulfilled without the delivery of that data. This definition fits software when it is an end item of the contract. The guidance cannot be bent to fit the situation. The law says that the software is technical data, but both FAR and DFARS says it is not technical data. How is it to appear in the contract? If it is technical data it must be on a DD Form 1423 treated as an exhibit. It must be priced in the exhibit not in a priced line or subline item. If it is not technical data but deliverable data, it still must be on a DD Form 1423. The problem, besides having no place on the DD Form 1423 for prices, is that DOD does not have a Data Item Description (DID) for the delivery of the software itself. Data to be delivered must be on a DD Form 1423, and to do this requires a DID for that data. When MIL-STD-2167 covering development of software came out, the DIDs referenced in it cover all of the the data supporting the development and use of the software,

but no DID covering the delivery of the actual software itself. Why would DOD pay to have software developed, have all the supporting documentation delivered, and then not require the delivery of the software?

The DOD data buyer needs help. He needs to be included in the committee set up to clarify the acquisition of data. That buyer should be one who knows the technical aspects of contracting. Software needs to be recognized as a deliverable end item of the contract. The guidance as a minimum should allow software as a priced line or subline item in the contract, a DID should be established for software, and it should be on a DD Form 1423 used as an attachment.

Earl T. Steiner

MR. EARL T. STEINER
8165 WOODLAWN DRIVE
PIQUA, OHIO 45356

513-773-2357

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252.227-7028 Requirement for technical data certification.

As prescribed at 227.473-4(a), insert the following provision:

Requirement for Technical Data Certification (APR 1988)

The Offeror shall submit with its offer a certification as to whether the Offeror has delivered or is obligated to deliver to the Government under any contract or subcontract the same or substantially the same technical data with other than unlimited rights included in its offer; if so, the Offeror shall identify:

(a) One existing contract or subcontract under which the technical data were delivered or will be delivered, and the place of delivery; and

(b) The limitation on the Government's right to use the data, including identification of the earliest date the limitation expires.

(End of provision)

252.227-7029 Identification of technical data.

As prescribed at 227.473-3(a), insert the following clause:

Identification of Technical Data (MAR 1975)

Technical data delivered under this contract shall be marked with the number of this contract, name of Contractor, and name of any subcontractor who generated the data.

(End of clause)

252.227-7030 Technical data—withholding of payment.

As prescribed at 227.473-5(b), insert the following clause:

Technical Data—Withholding of Payment (APR 1988)

(a) If technical data specified to be delivered under this contract, is not delivered within the time specified by this contract or is deficient upon delivery (including having restrictive markings not specifically authorized by this contract), the Contracting Officer may until such data is accepted by the Government, withhold payment to the Contractor of ten percent (10%) of the total contract price or amount unless a lesser withholding is specified in the contract. Payments shall not be withheld nor any other action taken pursuant to this paragraph when the Contractor's failure to make timely delivery or to deliver such data without deficiencies arises out of causes beyond the control and without the fault or negligence of the Contractor.

(b) After payments total ninety percent (90%) of the total contract price or amount and if all technical data specified to be

accruing to the Government under this contract.

(End of clause)

252.227-7031 Data requirements.

As prescribed at 227.475-1, insert the following clause:

Data Requirements (APR 1988)

The Contractor is required to deliver the data items listed on the DD Form 1423 (Contract Data Requirements List) and data items identified in and deliverable under any contract clause of FAR Subpart 52.2 and DoD FAR Supplement Subpart 252.2 made a part of the contract.

(End of clause)

252.227-7032 Rights in technical data and computer software (Foreign).

As prescribed in 227.475-5, insert the following clause:

Rights in Technical Data and Computer Software (Foreign) (JUN 1975)

The United States Government may duplicate, use, and disclose in any manner for any purposes whatsoever, including delivery to other governments for the furtherance of mutual defense of the United States Government and other governments, all technical data including reports, drawings and blueprints, and all computer software, specified to be delivered by the Contractor to the United States Government under this contract.

(End of clause)

252.227-7033 Rights in shop drawings.

As prescribed at 227.478-2(a)(2), insert the following clause:

Rights in Shop Drawings (APR 1966)

(a) Shop drawings for construction means drawings, submitted to the Government by the Construction Contractor, subcontractor or any lower-tier subcontractor pursuant to a construction contract, showing in detail (i) the proposed fabrication and assembly of structural elements and (ii) the installation (i.e., form, fit, and attachment details) of materials or equipment. The Government may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

(b) This clause, including this paragraph (b), shall be included in all subcontracts hereunder at any tier.

(End of clause)

252.227-7034 Patents—subcontracts.

As prescribed at 227.304-4, insert the following clause:

Patents—Subcontracts (APR 1984)

Materials Safety Data Sheet (MSDS) required by the clause at FAR 52.223-3.

(b) The clause at 252.227-7031, Data Requirements, states that the contractor is required to deliver only data listed on the DD Form 1423 and data deliverable under clauses prescribed in the FAR and DFARS.

227.475-2 Deferred delivery and deferred ordering.

(a) *General.* Technical data and computer software is expensive to prepare, maintain and update. By delaying the delivery of technical data or software until needed, storage requirements are reduced and the probability of using obsolete technical data and computer software is decreased. Purchase of technical data and computer software which may become obsolete because of hardware changes is also minimized.

(b) *Deferred delivery.* When the contract requires delivery of technical data or computer software, but does not contain a time for delivery, the clause at 252.227-7026 "Deferred Delivery of Technical Data and Computer Software", shall be included in the contract. The clause permits the contracting officer to require the delivery of data identified as "deferred delivery" data at any time until two years after acceptance by the Government of all items (other than data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors to deliver such technical data expires two years after the date the prime contractor accepts the last item from the subcontractor for use in the performance of the contract. The contract must specify which technical data or computer software will be subject to deferred delivery. The contracting officer should provide sufficient notice to permit timely delivery of the technical data or computer software.

(c) *Deferred ordering.* When a potential need exists for technical data or computer software, but a firm requirement is not established, the clause at 252.227-7027, "Deferred Ordering of Technical Data or Computer Software", should be included in the contract. Under this clause, the

termination, whichever is later. The obligation of subcontractors to deliver such technical data or computer software expires three years after the date the contractor accepts the last item under the subcontract. When the data and computer software is ordered, the delivery dates shall be negotiated and the contractor compensated for converting the technical data or computer software into the prescribed form. Compensation to the contractor shall not include the cost of technical data or computer software which the Government has already paid for.

227.475-3 Warranties of technical data.

The factors contained in Subpart 246.7, Warranties, shall be considered in deciding whether to include warranties of technical data. The basic technical data warranty clause is set forth in the clause at 252.246-7001. There are two alternates to the basic clause. The basic clause and appropriate alternate should be selected in accordance with section 246.708.

227.475-4 Delivery of technical data to foreign governments.

When the Government proposes to make technical data subject to limited rights available for use by a foreign government, it will, to the maximum extent practicable, give reasonable notice to the contractor or subcontractor asserting rights in the technical data. Any release shall be subject to a prohibition against further release, use or disclosure.

227.475-5 Overseas contracts with foreign sources.

The clause at 252.227-7032, Rights in Technical Data and Computer Software (Foreign), should be used in solicitations and contracts with foreign sources when the Government will acquire unlimited rights in all deliverable technical data, and computer software. However, the clause shall not be used in contracts for special works (see section 227.476), contracts for existing works (see section 227.477), or contracts for Canadian purchases (see Subpart 225.71, Canadian Purchases). However, the clause at

227.475-6 (Reserved)

227.475-7 (Reserved)

227.475-8 Publication

Alternate I of the clause at 252.207-13, Rights in Technical Data and Computer Software, shall be used in research contracts when the contracting officer determines, in consultation with legal counsel, that publication of the data by the contractor:

(a) Would be in the interest of the Government;

(b) Would be facilitated by the Government relinquishing its rights to publish the work for others to publish the work on behalf of the Government.

227.476 Special works.

(a) The clause at 252.207-13, Data—Special Works, shall be included in all contracts where the Government needs ownership or control of work to be generated. Examples include:

(1) Production of motion pictures;

(2) Television recordings without accompanying text;

(3) Preparation of scripts, musical compositions, tracks, translations, and the like;

(4) Histories of the Department for sale to the public;

(5) Works pertaining to morale, training, or public relations;

(6) Works pertaining to guidance of Government employees in the performance of their official duties; and

(7) Production of studies.

(b) Contracts for special works may include limitations with music licenses and the like which are necessary for the purpose for which acquired.

227.477 Contracts for existing works.

(a) *Acquisition.* The clause at 252.207-13, Data—Existing Works, shall be included in all contracts for the acquisition of existing motion

President
Kenneth McLennan

Vice President and Treasurer
Thomas F. Russell, Chairman
Federal-Mogul Corporation

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USX Corporation

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Reliance Electric Company

John J. Murphy, Chairman and President
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John M. Nelson, Chairman and President
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J. Tracy O'Rourke, President
Allen-Bradley Company

Earle W. Pitt, Chairman
The Foxboro Company

Donald A. Roach, President
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SPS Technologies, Inc.

Orin R. Smith, President
Engelhard Corporation

Ward Smith, Chairman and President
NACCO Industries, Inc.

Ralph Z. Sorenson, Chairman and President
Barry Wright Corporation

Neil A. Springer, Chairman and President
Navistar International Transportation Corp.

James R. Stover, Chairman
Eaton Corporation

Donald Taylor, Chairman
Rexnord Inc.

Raymond C. Tower, President
FMC Corporation

Edwin E. Tuttle, Chairman
Pennwalt Corporation

James S. Walsh, President
Wyman-Gordon Company

R. J. Wean, Jr., Chairman
Wean Incorporated

Roy Wennerholm, Jr., Chairman and President
Joy Technologies Inc.

James W. Wilcock, Chairman and President
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MAPI

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May 27, 1988

Mr. Charles W. Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
Room 3D139
The Pentagon
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

Interim Defense Department Regulations Relating To
Rights in Technical Data

DAR Case 87-303

We wish to comment on the interim regulations published in the Federal Register of April 1, 1988, that amend provisions of the Defense Federal Acquisition Regulation Supplement (DFARS) relating to rights in technical data under defense contracts.

According to the preamble statement to the rules, the interim regulations are intended to implement revisions required by Section 808 of the Fiscal Years 1988 and 1989 Department of Defense (DOD) Authorization Act (P.L. 100-180). Additionally, the preamble further states that, in drafting these rules, consideration was specifically given to Executive Order 12591, entitled "Facilitating Access to Science and Technology," issued on April 10, 1987, and to certain issues raised by public comments that were not adequately addressed during formulation of previous rules in this area. Our further understanding is that the interim rules are now in effect and supersede all prior regulations relating to rights in technical data for defense contracts resulting from solicitations issued on or after April 2, 1988.

For reasons more fully detailed below, we urge DOD to carefully review again these interim regulations with a view toward refining and redrafting them to reflect a policy that is more, not less, consistent with the position taken by the Administration and Congress in this very important area of rights in technical data. In particular, the regulations should demonstrate a more substantial effort to properly balance the interests of the government and the contractor.

MAPI promotes the technological and economic progress of the United States through studies and seminars on changing economic, legal, and regulatory conditions affecting industry.

MAPI's Interest

Before we address our comments specifically to the regulations, a brief description of our organization may be helpful. MAPI is a policy research institute whose 500 member companies are drawn from a wide range of U.S. industries. Our membership is comprised of leading companies and trade organizations, including ones engaged in heavy industry, aerospace, electronics, precision instruments, telecommunications, chemicals, computers, and similar high-technology industries. The Institute conducts original research in economics, law, and management and provides professional analyses of issues critical to the economic performance of the private sector. The Institute also acts as a national spokesman for its member companies, concerning itself with policies that stimulate technological advancement and economic growth for the benefit of U.S. industry and the public interest.

Although most of our member companies in these industries are predominantly oriented toward the commercial market, a significant number have substantial defense sales at the prime and/or subcontract level and their continuing participation in such business is vital to the maintenance of a strong national defense industrial base. Virtually all of our member companies are engaged in development of innovative technology to maintain economic viability in the competitive U.S. and world markets and, therefore, attach paramount importance to issues concerning protection of technical data rights in both the commercial and government sectors. Thus, DOD's interim regulations are of direct and significant concern to our member companies that have existing defense business or are contemplating defense business as a future market.

Specific Comments

Specific Guidance Is Needed To Establish When Negotiations Are Impracticable

Regarding data relating to an item developed with mixed contractor-government funds (mixed funding), Congress specified through last year's legislative amendments that rights in technical data ". . . shall be based upon negotiations between the United States and the contractor, except in any case in which the Secretary of Defense determines, on the basis of criteria established in the regulations, that negotiations would not be practicable." ¹ (Emphasis added.)

The criteria set forth in the interim regulations, under Subpart 227.473-1(d), merely provide that the contracting officer may determine that negotiations are impracticable ". . . when there are numerous offerors or when an award must be made under urgent circumstances . . . ," and that

¹/ National Defense Authorization Act for Fiscal Years 1988 and 1989, P.L. 100-180, Sec. 808(a)(2)(B).



Georgia Institute of Technology
Atlanta, Georgia 30332-0420

GEORGIA TECH 1885-1985

DESIGNING TOMORROW TODAY

J. W. Dees, Director
Office of Contract Administration
(404) 894-4810

3 June 1988

Mr. Lloyd:

Attached is a corrected version of my May 30, 1988 letter. The word "universities" has been inserted in line 7 of the first paragraph and the word "no" has been corrected to read "not" in the sixth line of the third paragraph.

Sincerely,
J.W. Dees



GEORGIA TECH 1885-1985

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May 30, 1988

Mr. Charles W. Lloyd
Executive Secretary
ODASD(P)DARS
c/o OASD(PL)(MRS)
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Ref: DAR Case 87-303

Dear Mr. Lloyd:

This letter is submitted in support of the position of the Council on Governmental Relations in their 11 May 1988 letter on the above referenced matter. Georgia Tech, as both a major research university in the area of information technology and developer of computer software which has been successfully commercialized, urges the implementation of a Federal policy on computer software and data which parallels that contained in Public Law 96-517. P.L. 96-517 has facilitated stronger research relationships between research universities and industry. This benefit should be expanded across the broad spectrum of intellectual property.

As was pointed out in testimony given on by M.I.T.'s George H. Dummer on 30 April 1987 before the U.S. House of Representatives Committee on Science, Space and Technology, Subcommittee on Science, Research and Technology, the effective transfer of university generated technology requires the consideration of different (trade secret, patent, copyright) intellectual property rights. Technology can no longer be cleanly categorized as only having one kind of right subsisting within it.

Georgia Tech is one of many universities facing this issue. The technology developed in university laboratories under Federal sponsorship comprises only the starting point for technological innovations which are a necessary part of our maintaining our position in the worldwide scientific community. A progressive, consistent set of Federal policies in the area of intellectual property ownership and rights would have a positive effect which would benefit not only universities, but the nation as well.

We would be pleased to provide additional information at your convenience.

Sincerely

Georgia Institute of Technology

By: J. W. Dees, Director

Office of Contract Administration

cc: Milt Goldberg, Executive Director
COGR



United Technologies Building
Hartford, Connecticut 06101
203/728-6255

Joel W. Marsh
Director
Government Issues

May 31, 1988

Mr. Charles W. Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
ODASD(P)/DARS
c/o OUSD(A) (M&RS)
Room 3D139
The Pentagon
Washington, DC 20301-3062

Dear Mr. Lloyd:

United Technologies Corporation (UTC) appreciates the opportunity to comment on the Department of Defense Federal Acquisition Regulation Supplement; Patents, Data and Copyrights (DAR Case 87-303).

UTC has supported the joint efforts of the Department of Defense (DoD), Department of Energy, National Aeronautics and Space Administration, and Office of Management and Budget/Office of Federal Procurement Policy to develop a regulation that balanced the interests of government and industry based on the President's Policy on Science and Technology, the recommendation of the Packard Commission on Technology, and the will of the Congress as expressed in Public Laws 99-661 and 100-180. Consequently, we were surprised that the interim regulation bears so little resemblance to the proposed approach by the joint agencies.

UTC has also supported the Aerospace Industries Association (AIA) task force which worked with the Council of Defense and Space Industries Association (CODSIA) in developing a composite industry response to this interim regulation. This response provides specific comments on issues which, if incorporated, could improve the interim regulation as currently structured. We wholeheartedly support these recommended improvements and will be available to further assist AIA/CODSIA in supporting your efforts to develop a more equitable final regulation.

Aside from the details provided in the AIA/CODSIA response, we encourage you to focus your attention on what appears to be an inherent philosophical difference in what the DAR Council intends to achieve through the interim regulation and the objectives of the President's Policy on Science and Technology, the Packard Commission's recommendation on Technology, and the Congress as stated in Public Laws 99-661 and 100-180. Although the wording of the regulation is very complex, it would appear that the DAR Council has placed the Government's need for unlimited rights in technical data for competitive reprocurement purposes as the overall and primary objective of the regulation. Any "balancing"

of interests of government and industry in technical data appears to be secondary to that overall objective. The following two points will illustrate: first, data not included in a contract listing is automatically defined as "unlimited rights"; and second, the expansive definition of "required in the performance of a contract" will involve background manufacturing and design technology never before considered as developmental work required under contract. Both will cause forfeiture of valuable property rights and represent radical departures from past regulatory requirements.

In addition, the interim regulation will be unwieldy. The opportunity provided in the regulation for industry to utilize and protect privately developed technology, for example, is administratively burdensome, will necessitate extensive paperwork, and will require systems not currently in existence. Moreover, the approach also appears threatening in today's litigious environment due to the liberal use of the "notification" and "certification" requirements.

The concepts of "list or lose" and "development necessary for performance of a government contract or subcontract" are very broad and do not encourage risk taking on the part of industry to incorporate new or emerging technologies into DoD products. The expanded requirements for paperwork development, paperwork retention, "notification", and "certification" as a part of the bid/proposal process for new contracts will discourage the aggressive use of privately developed technology in defense products. This is especially true when it is recognized that sustaining a successful claim of "limited rights" will be expensive, time consuming and treacherous since a successful claim would be undesirable and inconsistent with the overall objective of the interim regulation.

UTC believes the regulation needs extensive revision without the overwhelming bias in favor of unlimited rights in all categories of data. These revisions could be enhanced through an understanding of the types of technical data and the needs of the government in these data. We believe the issue of rights in technical data is minimal in connection with providing technical data for training, operation, maintenance, overhaul, and repair. We believe that the substance of the technical data issue lies in the area of competitive procurement data. However, the "cast net" approach of the interim regulation in obtaining technical data for government needs fails to recognize the broad range in types of data and industry's willingness and ability to satisfy much of the government's needs in this data. Instead, this

approach focuses extraordinary emphasis on the government's need for unlimited rights in competitive reprocurment data. We believe that the issue could be brought to a more satisfactory conclusion by a joint government/industry effort with the specific assignment of satisfying the technical data requirements as mandated by the Executive Branch and in Public Laws.

UTC appreciates the opportunity to comment on this interim regulation. We support any effort that the DAR Council might undertake to work with industry in developing a final regulation that reflects an understanding of technical data issues in an effort to provide a balance between the interests of the parties. If UTC can be of assistance to the DAR Council in developing the final regulation, please feel free to call upon us.

Very truly yours,

Joel W. Marsh
Joel W. Marsh
/ldj

UNIVERSITY OF
ROCHESTER

OFFICE OF RESEARCH &
PROJECT ADMINISTRATION

31 May 1988

Mr. Charles W. Lloyd
Executive Secretary
ODASD(P)DARS
c/o OASD(PL)(MRS)
Room 3D139, The Pentagon
Washington, DC 20301-3062

Subject: DAR Case 87-303

Dear Mr. Lloyd:

The University of Rochester offers the following comments to the interim rule published at 53 FR 10780 under the DFARS Subpart 227.4 - Technical Data, Other Data, Computer Software, and Copyrights. Rochester's sponsored research base this year is approximately \$110 million and represents research for a broad range of disciplines including the School of Medicine and Dentistry, College of Engineering and Applied Sciences, and the School of Arts and Sciences. Rochester has successfully engaged in technology transfer, has an established technology transfer program and has been recognized by industry as having developed technology suitable for development and commercialization by corporations.

Public Law 96-517, as amended, by giving nonprofit organizations and small business the right to own, develop, and commercialize patentable inventions resulting from federally funded research grants and contracts, has facilitated strong research relationships and technology transfer between universities and industry. Since the enactment of this public law, corporate sponsorship has increased by approximately 52% at Rochester. This can be attributed, in part, to the enactment of this law. We also recognize that university-generated technology requires licensing and administration of a combination of intellectual property rights. At Rochester we are researching and developing nuclear magnetic resonance imaging devices that require integrated hardware and software systems, integrated circuits, and chip designs that include or could include a combination of intellectual property rights. The proposed interim rule does not parallel the existing federal policy for patents and technology transfer and consequently will not encourage and will, in fact, make it more difficult to transfer university technology for commercial development.

Section 227.472, "Acquisition policy for technical data and rights in technical data", indicates that only the government can fulfill its obligations of technology transfer and fails to recognize the valuable role that universities have in the dissemination of research results. We recommend under 227.472 -1(b) and 1(c) that language is added that recognizes the contribution of universities and their technology transfer programs.

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Sections 227.472-2 and 227.472-3 (a)(1) is reminiscent of pre-Public Law 96-517 when the government needed to be petitioned by contractors for extended rights to patents. Prior to Public Law 96-517 commercial corporations were not encouraged, guaranteed, nor was the process made easy for universities to collaborate with industry in the transfer of technology. This section will have the same affect on universities and industry. Universities' ability to transfer technical data and software to industry will severely inhibit the strength and vitality of its interactions and technology transfer with industry. The mere existence of the government's unlimited rights, whether exercised or not, will severely limit the transfer and commercialization of technology developed at universities. When one couples this proposed section with the preponderance of new federal grant programs that encourage and require university and industrial interaction and commercialization research activities, one finds that they are at diametric ends. We recommend that government rights should be limited to data in which the government has a need and which cannot be supplied by other means or which is specifically required to be delivered under the terms of the contract. This would effect the transfer of technical data and computer software to both the government and commercial concerns in the same processes and benefits as is required for patentable technology.

In addition to the above recommended changes Rochester recommends that section 227.472-3(a)(2)(ii)(B) be omitted. Publication of research results is a priority of every university; publications, however, are sometimes jointly made with the commercial development of technical data and computer software. The government should not acquire unlimited rights to this data unless it is required as part of the statement of work and the Government should accept GPLR when a small business or nonprofit organization agrees to commercialize the technology.

University technical data and computer software is usually a cumulative result of many years of research and effort with a multitude of sponsors, (i.e. university, federal, foundation, and corporate). Section 227.473-1(b)(2) should be augmented to provide guidance to contracting officers when technical data and computer software accrues from universities and other nonprofits. The government should only be able to acquire GPLR if it does not need to use the data for competition and the university or other nonprofit is interested in commercializing the data.


As discussed above it is very difficult to modify federal regulations for basic research performed at universities. Competitive procurement of items, components, parts and processes usually does not occur at universities. As in recent regulations, i.e. patent regulations, universities were combined with the Small Business Innovative Research Program (SIBR). As an alternative to extensive language modification, Rochester recommends that the SIBR rights in technical data and computer software be modified to include universities and other nonprofits.

Mr. Charles W. Lloyd
Re: DAR Case 87-303

31 May 1988
Page 3

Thank you for the opportunity for the University of Rochester to comment on such important and far reaching regulations for universities and the ultimate transfer of technology to corporations for commercialization.

Sincerely,



Jane A. Youngers
Director

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87-303



May 31, 1988

Defense Acquisition Regulatory Council
The Pentagon
Washington, DC 20301-3062

Attention: Mr. Charles W. Lloyd
Executive Secretary
CDASP (P) DARS c/o OASD (P&L) (MRS)
DAR Case 87-303


Dear Mr. Lloyd:

Aeroquip has reviewed the DAR Council interim changes to Subpart 227.4 and Part 252 of DFARS as published in the Federal Register on April 1, 1988. Aeroquip does not support the proposed changes.

Aeroquip does endorse the comments submitted to you by the Proprietary Industries Association pursuant to the 60 day public comment period. We believe these comments deal fairly with innovative aerospace sub-contractors.

Should additional information be required, please contact the undersigned.

Very truly yours,


Larry Barnhart
Marketing Manager
Product Development

LB:tr

cc: Bettie S. McCarthy
Government Relations Consultant
733 15th Street, NW, Suite 700
Washington, DC 20005

Proprietary Industries Association
220 No. Glendale Ave. Suite 42-43
Glendale, CA 91206
Attention: H. (Bud) Hill Jr., Counsel

Mark A. Conrad
Vice President -
Secretary and General Counsel
Aeroquip Corporation
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Jackson, MI 49203

Case Management Record

DAR Case No. 87-303	CAAC No.	Original Updated	Date	
Title Tuck Watu				
Reference				
Synopsis Add'l Pub Cmts				
Priority	Submitted By	Originator Code	Case Manager	
Keywords				
Case References				
FAR Cites				
DFARS Cites				
Cognizant Committees	TD			
Recommendation				
Notes				

Case Management Record

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DAR Case No. 87-303		CAAC No.		Original Updated	Date 6/27/88
Title TECH DATA					
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Synopsis Additional Public Comment					
Priority	Submitted By	Originator Code		Case Manager	
Keywords					
Case References					
FAR Cites					
DFARS Cites					
Cognizant Committees					
Recommendation Assign to Tech Data Comm					
Notes					

87-303

JUN 20 1988

Honorable Robert B. Costello
Under Secretary of Defense
for Acquisition
Department of Defense
The Pentagon - Room 3E808
Washington, DC 20301-1000

Dear Dr. Costello:

We have completed our review of the interim regulation entitled, "Patents, Data, and Copyrights," published in the Federal Register on April 1, 1988. We appreciate your efforts to respond to the issues raised in our letter of February 29, 1988 on an earlier draft of the rule. Also, discussions with your staff have proven most helpful in allaying some of our concerns, particularly with regard to your intentions on the treatment of data rights for items developed solely or predominantly with contractor resources. While I expect that this issue and others raised in this letter will be satisfactorily resolved in the final rule, these comments can, of course, only address the regulation as published. I am concerned that a number of provisions of this interim rule do not appear to meet the President's technology transfer objectives and will not support the Department's goal of achieving cost-effective procurements. In addition, several of the provisions in the final rule do not appear to meet the requirements of the Paperwork Reduction Act and its implementing regulations, which specify that a collection of information: (1) must be necessary to perform the agency's functions, (2) must be the least burdensome method of meeting the agency's need, and (3) must not be duplicative with any other collection by the Federal Government. These concerns are described in detail in the Enclosure.

We have all become increasingly concerned about the impact of changes in procurement statutes, policies, and regulations on the defense industrial base. Clearly the quality and capacity of that base, and our ability to meet future defense needs, must be ensured to achieve the level of national security we demand. The determination of rights in technical data developed using private or Government resources will be a key determinant of our success in this regard.

Our ability to leverage the Government's investment in product development will be influenced significantly by the Department's procedures to protect from release or disclosure

technical data pertaining to a product developed at private expense and to encourage commercialization of Government funded technologies. Since the Department's regulatory procedures on rights in technical data will affect the expected rate of return on initial or subsequent contractor investment, the contractors' incentives for product innovation and their willingness to provide high quality products for the defense market also will be influenced by these regulations.

For any contractor to invest scarce resources in the initial or further development of a technology, he must be assured of a reasonable return on that investment. The potential for disclosure of technical data to potential competitors, and the Government's discretionary control of that disclosure, will increase the risk associated with any investment and possibly reduce the incentives for the contractor to absorb that risk.

Technical data represent special types of commodities with unique problems, in that disclosure of these data can generally be accomplished very easily and, once disclosed, the commercial value of the technology is significantly diminished. Thus, to provide the necessary incentives to develop and market new technologies, the Government must be especially attentive to the need to manage effectively our demand for, and access to, technical data and provide the appropriate protections from disclosure regardless of the source of funding for the data.

If, through Government disclosure of the technical data, a competitor can replicate the technology, then the contractor who spends his scarce resources to develop the original product or enhance significantly an existing product is at risk of being unable to recoup the full costs of development, let alone obtain a reasonable return on that investment. If the Department, through its technical data regulation, unnecessarily imposes additional risk of disclosure and, thereby, reduces the expected return on the contractor's investment in product development, which is frequently far in excess of the initial research investment, then the contractor's incentive to make that investment will be reduced. More importantly, the contractor may decide not to sell in the defense market or to sell the Department second or third best technologies.

We also strive to achieve effective competition. To obtain competition among suppliers for a product or process developed using Government funds, a potential Government contractor may need to have access to technical data pertaining to that product or process. Again, however, we must be particularly careful not to unilaterally acquire and

disclose technical data developed using Government or private funds only to lose opportunities to purchase the best technologies to meet our defense needs and significantly enhance competition in the long term.

Similarly, we can enhance the competitive base through our regulatory policies if we specifically and emphatically endorse contractor innovation. Competition can be effectively stimulated by providing the necessary incentives for the contractor to take full commercial advantage of our technologies, not only to increase the ability of domestic industries to compete internationally, but also to meet our defense needs more effectively. To this end, contractors should be given strong incentives to develop new products and improve existing products developed under Government contract.

The opportunity costs of lost innovation or reduced competition are easy to ignore, since regulations that discourage technological innovation will not be recognized in the acquisition system for some time. However, if we concern ourselves only with immediate and seemingly more pressing needs, then we risk losing in the longer term our defense readiness and technological advantage.

We must recognize that a technical data rights regulation that will maintain or, where necessary and possible, enhance the defense industrial base may have short term costs. The contractor who develops a superior product or process will realize a higher profit in the short term relative to his competitors. Thus, for a period of time, the inventor's and the Government's interests may appear to diverge. However, the protection of the contractor's economic interest is absolutely essential to encourage the contractor to invest in the development of the product or process in the first place. If the contractor cannot be assured of keeping the invention secret at least for a time, then he will not invest and the Government will not have access to the technology. Therefore, effective protection of technical data, regardless of the source of funding, is in the Government's best interest.

The Department seems to recognize these concerns. In the general policy statement, the Department indicates that it will obtain only the minimum essential technical data and data rights and will do so in a manner that is least intrusive to the contractor's economic interests. However, the rule lacks the essential ingredient to implement that policy--the procedures that the contracting officer must use to determine what technical data the Department specifically needs and how to meet those needs in a manner that is least damaging to the contractor's economic interest. In our

February 1988 letter, we urged the Department to include such procedures in the final rule. We continue to view these procedures as absolutely essential to ensure that the Department will have access to advanced technologies to meet our defense needs and that it can meet those needs in a cost-effective manner. We recommend that the Department include such technical data acquisition procedures in the rule. These technical data acquisition procedures would then complement the existing requirements at 217.72, which specifically direct the contracting officer, presumably after consultation with the other members of the project team, to "decide whether to procure data for future competitive acquisition" in accordance with the provisions of Part 227. If it is considered inappropriate to include such procedures in the rule, at a minimum, they should be identified with a Departmental Directive or Instruction, and specifically referenced in the rule. Our clear preference, however, is for these procedures to be included in the rule itself.

We recognize the Department's concern that future competition may be held hostage to a critical element that the contractor chooses to develop at private expense. But we should be especially careful not to threaten a contractor's legitimate proprietary technology to eliminate such a possibility. We have serious concerns that the new definitions in Section 227.471 of "developed exclusively at private expense" and "developed exclusively with Government funds" will not provide the protections from disclosure that are necessary to encourage contractors to sell their proprietary products to the Government and will not promote private resource investment in the development of defense technologies. The classification of technical data as "developed exclusively at private expense" or "developed exclusively with Government funds" is contingent on whether the item, component, or process to which the data pertain is "required as an element of performance under a Government contract or subcontract," or, as this is defined in the rule, "development was specified in a Government contract or subcontract or that the development was necessary for performance of a Government contract or subcontract." Under the Department's rule, for example, the definition of "developed exclusively with Government funds" will apply to all technical data pertaining to an item, component, or process when its development is necessary for the performance of a contract, even if it was developed solely or predominantly with contractor resources. The Department can then claim "unlimited rights" in those technical data, which includes the "rights to use, duplicate, release, or disclose...in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so." Thus, technical data pertaining to proprietary products or products in which the contractor has invested substantial resources will not be protected. This indirect

means of obtaining "unlimited rights" to what would logically be considered proprietary technical data does not appear to respond to the requirements of the Defense Authorization Act of 1987 or the draft policy developed in accordance with Executive Order 12591. Moreover, I do not believe that it is your intent to acquire unlimited rights in this manner. I recommend that in the definition of "required as an element of performance" the Department delete the reference to "development was necessary for performance of a Government contract or subcontract," to eliminate any uncertainty about how the definition would be applied.

Several of the requirements appear to be largely redundant and, hence, inconsistent with the requirements of the Paperwork Reduction Act and its implementing regulations and the Department's regulatory simplification objectives. The absence of a link between the notification requirements in Section 227.473-1 and the listing requirement in Section 227.472-3(a) is particularly confusing. For example, the Department's rule appears to require at least four documents from the contractor that identify the rights in technical data: (1) a "preaward notification" (227.473-1(a)(2)) to identify products or processes that would result in the delivery of technical data to the Government with other than unlimited rights; (2) "continual postaward notification" (227.473-1(a)(3)) to continue notification during performance of the contract; (3) a "certification" (227.473-1(a)(4)) to identify the contract under which the data are or were delivered, the expiration date and limitation on the Government's use, and an authorization for the contracting officer to request additional information to evaluate the assertions; and (4) a "listing" (227.472-3(a)) of technical data delivered to the Government with other than unlimited rights. These requirements, as drafted, appear to be duplicative and, hence, do not provide the least burdensome means to achieve the Department's objectives. If the rule is not referencing four distinct lists but rather one list that may be updated at different times, then an easy way to clarify this would be to provide a descriptive name for the list, and refer to this same list throughout the rule. In any regard, we recommend that the Department reduce the notification procedures to one set of consistent, nonduplicative requirements for identification of rights in technical data.

The listing requirement raises other concerns as well. Under the Department's rule, for example, if a contractor fails to include in the list technical data pertaining to a privately developed product, then the Government will claim "unlimited rights" to such data. Failure to include proprietary data on a listing should not serve as a means for the Government to obtain "unlimited rights" to privately developed

technologies. The Department has other provisions in the rule that will meet its needs for identification, notification, and verification while protecting the contractor's property and economic interest. Unfortunately the listing requirement at 227.472-3(a) appears to be a "gotcha" provision with no further attempts by the Government to clarify rights in the technical data, particularly when the data are marked in a manner that is inconsistent with the listing. We recommend that the Department reconsider the use of listing requirements in Section 227.472-3(a) as a means of claiming "unlimited rights" in technical data, or at least, provide procedures in the rule to allow contractors an opportunity to correct errors in the designation of data rights.

The Department's rule indicates in Section 227.473-1(b) that the contracting officer should not negotiate Government Purpose License Rights if the technical data are needed for immediate competition and if protection of the contractor's rights would be "unduly burdensome on the Government." The application of the "immediate competition" test should be rather limited, since the negotiation with the developing contractor regarding rights in technical data should take place in the early stages of the research and development contract. It is difficult to foresee a situation, except perhaps a national emergency, in which the Government would compete a product before the development had been completed. The test of "unduly burdensome" also is undefined in the Department's rule. This test should be clarified through specific procedures regarding the acquisition of technical data or rights in technical data. Thus, the need for such procedures on how and when to acquire rights in technical data is further emphasized. We, therefore, recommend that the Department delete Section 227.473-1(b)(2)(ii)(B) of the rule and substitute a reference to the acquisition procedures as discussed above.

And, finally, I would urge that the Department review and, wherever possible, simplify the contract clauses in the rule. Since in many cases these clauses trigger activities that are covered under the Paperwork Reduction Act, we must be assured that they are the least burdensome necessary to meet the Department's specific needs. In accordance with the Department's recent request, we will provide you with some suggested changes to the clauses to meet these objectives.

I appreciate your consideration of these comments.

Sincerely,

Allan V. Burman

Allan V. Burman
Deputy Administrator and
Acting Administrator

Enclosure

Summary of the Issue

Public disclosure by the Government of technical data developed using private or Government funds can cause serious hardship to the developing contractor, reduce the commercial value of the technology, and thereby jeopardize the incentives necessary for the contractor to develop and market new technologies for the private and Government markets. Even the mere threat of public disclosure by the Government will reduce the expected return on the firm's research, development, and marketing of the technology and, consequently, will reduce the incentive for a firm to incur the often substantially greater cost to develop new products or processes for military and commercial markets.

In a recent paper published by the National Bureau of Economic Research, these characteristics of technological innovation were highlighted:

"The new knowledge or innovation may be a cost-reducing process, a product, or some combination of the two. The knowledge-producing firm earns a return either through net revenues from the sale of its own output embodying the new knowledge or by license and nonmonetary returns collected from other firms which lease the innovation. Since the private rate of return to research depends on the present value of the revenues accruing to the sale of the knowledge produced, the conceptually appropriate rate of depreciation is the rate at which the appropriable revenues decline for the innovating firm. The rate of decay in the revenues accruing to the producer of the innovation derives not from any decay in the productivity of knowledge but rather from two related points regarding its market valuation, namely, that it is difficult to maintain the ability to appropriate the benefits from knowledge and that new innovations are developed which partly or entirely displace the original innovation." (Ariel Pakes and Mark Schankerman, "Obsolescence, Research Lags, Rate of Return to Research," in R&D, Patents, and Productivity, 1984, pp. 74-75.)

The Government, through its regulations and technical data management, will affect the rate of decay of revenues from investment in technological innovation. When, as a consequence of potential disclosure of his technology, the contractor is at-risk of being unable to recoup the full costs of development of a product or process, including a reasonable return on that investment, then the contractor will increase the expected rate of decay of potential revenues and, correspondingly, will lower the expected rate

of return on the investment. As a consequence of the diminished return, the contractor often may decide not to develop the product or process or, in an effort to limit the risk of disclosure, not to provide the product or process to the Government market at all.

Protection of technical data for a period of time, and hence protection of the economic interest of the developing contractor, is necessary to ensure that the technology can be effectively used in the development of new and improved products and processes for the private and Government markets. Protection of technical data, therefore, should not be considered merely of concern to the contractor. It should also be a high priority of the Department of Defense. In the absence of protection of technical data regardless of the source of funding, the Government will lose significant opportunities to enhance the industrial base, promote contractor investment in the continued development and production of high quality, high performance defense products, ensure Government access to these products, and provide for the long term competition necessary for cost-effective procurements.

While the Government sometimes needs technical data pertaining to items, products, or processes it procures, many of these Government needs can be effectively and efficiently met by ensuring Government access to the technical data rather than the Government's physical possession of the technical data. Physical possession of the technical data by the Government, in many cases, wastes Government resources and unnecessarily jeopardizes the commercial value of the technology. The Government can often meet its procurement needs more cost-effectively through direct licensing and nondisclosure agreements between the respective contractors.

Risk of Disclosure under the Freedom of Information Act

The risk of disclosure of the technical data is heightened by the potential for competitors to obtain valuable technical data through a Freedom of Information Act (FOIA) request. The Department of Justice in a May 1987 letter to USAF General Skantze has indicated that technical data appear to fall within the definition of "records" under the Records Disposal Act (44 U.S.C. 3301), which includes:

"books, papers, maps, photographs, machine readable materials, or other documentary materials...made or received by an agency of the United States Government under federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor...because of the informational value in them."

The Department of Justice also noted that Section 2328 of Title 10 clearly contemplated release of technical data to a person requesting such release under FOIA. Regarding the contractor's proprietary technical data, the Department advised that:

"As a threshold matter, any technical data submitted under a procurement contract containing a restriction on the rights of the United States to release or disclose could not be disclosed under the FOIA, and FOIA requests for such material can be summarily denied. The 1986 amendments to 10 U.S.C. 2320 are particularly clear on this point. Should a FOIA request be filed with respect to any technical data as to which the contractor claims proprietary rights which have not been finally determined, all appropriate challenge procedures for determining such rights under 10 U.S.C. 2321 or other applicable law or regulations should be followed in full before any such data can even be considered for disclosure pursuant to the FOIA. Thus, there is no conflict between the FOIA and the DOD procurement laws protecting contractors' proprietary rights in any technical data: to the extent that disclosure of the data is restricted by law, including during any period needed to validate the proprietary data restrictions under applicable law, the data need not (indeed cannot) be disclosed under the FOIA, and FOIA requests for such materials, accordingly, can and should be denied."

However, because the courts have viewed the statutory exemptions as basically permissive, the agency would appear to have the discretion to disclose such technical data. Consequently, the Government contractor will be continually at-risk of losing even his proprietary technology to a competitor via a FOIA request.

While the Justice Department indicates that protection of technical data pertaining to an item, component, or process developed solely by the contractor can be provided, these discretionary protections may not apply to technical data developed partly or wholly with Government funds. The courts may conclude that Government contracts that permit the contractor to retain such technical data for exclusive commercial use are not sufficient to create the potential for exemption as proprietary technical data. In which case, the Government's efforts to promote effective and more extensive use of our technologies may be completely thwarted by FOIA requests directed solely at discovery of the developing contractor's valuable technology. The Government's physical possession of the technical data, because such action creates an "agency record," could then trigger a FOIA request from a competitor and the commercial value of the technology will be diminished.

Research by Thomas Susman indicates that contractors do and should seriously consider the possibility of disclosure of technical data under FOIA. He also notes that the added risk of such disclosures ultimately damages the Government:

'What little empirical data there are on the impact of the FOIA on government contractors are quite disturbing. In the late 1970s an author surveyed major Air Force contractors and procurement officers and concluded: "Some of the major aerospace contractors are withholding state-of-the-art technology from their proposals to prevent release via the Freedom of Information Act." Similarly, a series of interviews with high technology firms in the Boston area revealed that "several firms did cite the fear of losing proprietary technical information as a primary factor in their decisions not to compete for government-contract work." ("Risky Business: Protecting Government Contract Information Under the Freedom of Information Act," Public Contract Law Journal, 1986, p. 19.)

While Susman acknowledges the potential for withholding confidential commercial information under Exemption 4 of the Act, he also notes that meeting the requirements of this exemption is often difficult and acceptance by the courts of this exemption for technical data is not assured. He states that:

"Counsel advising a government contractor on the possible risk of later disclosure of information provided to an agency will thus seldom be able to give a firm opinion on whether specific data will definitely be withheld from disclosure. (That agreements with agency personnel over the confidentiality of information are not enforceable only exacerbates the situation.) Unfortunately, not only is the substantive application of the fourth exemption to contractor information unsettled, but the procedures surrounding how agencies and courts make those determinations are equally unsettled...no matter how careful the contractor, submitting sensitive commercial information to the government remains risky business." (pp. 22, 27)

The Government can successfully reduce the additional risk that FOIA implies for technological innovation by severely limiting the technical data physically acquired by the Government. The Government can often successfully meet its needs by ensuring access to the necessary technical data through direct licensing or nondisclosure agreements between the respective contractors as opposed to Government possession and subsequent distribution of the data.

Some Benefits of Protection and Transfer of Technical Data

If the Department is to have access to state-of-the-art technologies and increase competition, then we must provide the necessary regulatory environment for the technological investment to occur. The 1988 Economic Report of the President presented some of the reasons for protection of technical knowledge and benefits of technology transfer by the Government:

"Investment in knowledge, like other investment, depends on rights to future returns. Even in research that is publicly supported, the incentives created by property rights have powerful effects. Patent, licensing, trademark, copyright, and trade secrets laws are critical in determining the share of the returns from commercially valuable ideas and inventions to which an inventor or investor is entitled. The dramatic advance of commercial biotechnology since 1980, for example, was aided by the U.S. Supreme Court decision that microorganisms produced by genetic engineering were patentable. Federally sponsored research can benefit from the incentives created by property rights. The Patent Law Amendments of 1980 provided a uniform system for assigning title to inventions made at universities that conduct government-sponsored research. Between 1980 and 1986 cooperative ventures increased, and the number of patents issued to American academic institutions grew by 70 percent. Before these reforms, patenting such inventions was uncertain, and cooperative research ventures between private firms and universities were difficult to establish because of the complex regulations that accompanied Federal funding." (p. 184)

Similarly, Kamien and Schwartz in a 1982 study found that:

"Stories of government-sponsored research failing to reach fruition in the form of commercially available new product or process revolve around the unwillingness of firms to engage in their final development and marketing without exclusive rights. For example the unwillingness by the Department of Health, Education and Welfare to grant exclusive rights, in the form of patents, to private pharmaceutical firms retarded commercial development of an early blood test for breast and digestive tract cancer and a test-tube method for testing the effectiveness of different cancer drugs before administering them to a patient." (Market Structure and Innovation, p.17)

In a recent report on the results of Public Law 96-517, the Small Business Innovation Development Act, which gave nonprofit organizations and small businesses the right to

retain title to Federally funded inventions, the GAO noted that, while a full evaluation of the commercial consequences of the Law is premature, a significant increase in business financial interest in university research has occurred:

"Administrators at 25 universities stated that Public Law 96-517 has been significant in stimulating business sponsorship of university research, which has grown 74 percent from \$277 million in fiscal year 1980 to \$482 million in fiscal year 1985 (in constant 1982 dollars)." ("Patent Policy Recent Changes in Federal Law Considered Beneficial," April, 1987, p. 3.)

This increase in private business commitment clearly indicates that the private sector expects significant returns from the commercial application of these inventions. According to the GAO, over 900 patents were issued to universities in 1987 -- four times the number issued in 1976, the last year the statistics were collected by the Department of Commerce, and prior to implementation of regulations to permit universities to have the rights to inventions developed under Government contract. Although these data are not conclusive, they certainly suggest a resurgence of innovative effort in the university community that is strongly correlated with legislation permitting them to retain rights to inventions developed using Federal funds.

Effective transfer of Government-funded technologies to contractors and protection of the contractor's investment in further development and marketing of the technologies for a period of time will in the long term enhance competition. In a recent report, the Office of Technology Assessment (OTA) noted the significant cost savings that can accrue when technological advances widen the competitive base. For example, OTA reported that:

"One of the classic illustrations of a successful, major Government contribution to information technology R&D is in the field of satellite communications. The National Aeronautics and Space Administration...had the leading role in pioneering technological progress toward commercial development, accelerating the time frame for the introduction of this technology, influencing the structure of the U.S. domestic and international telecommunications common carrier industries, and effecting significant cost savings over the long run.

It is also interesting to note that these NASA programs likely had some important side-effects on the structure of the U.S. international satellite communications industry. Because AT&T was the only private company to have heavily invested its own funds for satellite communications R&D...it is likely that AT&T would have dominated the new international and domestic satellite

communications services industry. Instead, the NASA programs, through continuous transfer of technology to, and close interaction with, commercial firms stimulated the competition that followed the 1972 Federal Communication Commission's decision allowing open entry into the domestic satellite communications services industry." (Information Technology R&D: Critical Trends and Issues, February, 1985, pp. 30, 31.)

Federally-funded research and development also has been shown to be a factor that encourages privately-funded R&D. In about one-third of the cases studied, firms invested their own private funds into projects identified during the performance of Federally-funded R&D projects. The likelihood of such spinoffs was found to be considerably enhanced if the firm helped to formulate the ideas on which the project was based. (Mansfield, "R&D and Innovation," National Bureau of Economic Research, 1984)

This is not to suggest that transfer of technologies developed under Department of Defense contracts will result in a blizzard of new products and processes for consumer use. Indeed, the more significant and immediate beneficiary of an effective technical data regulation will be the Department of Defense.

The President's Policies

The President's policies concerning technology transfer have recognized and responded to the need for more effective and extensive technology transfer to the private sector. In the Memorandum on Patent Policy (February 1983), the President charged Federal agencies to promote the commercial use of inventions arising from Federally funded research and development. In his Competitiveness Initiative (January 1987), the President tasked Federal agencies to help commercialize non-patentable results of Federally funded research by permitting contractors to own technical data developed under Government contracts. In Executive Order 12591 (April 1987), agencies, under the guidance of the Office of Federal Procurement Policy (OFPP), were required to develop a uniform policy permitting Federal contractors to retain rights to technical data developed under Government contracts in exchange for royalty-free use by the Government. A draft OFPP policy implementing this requirement of the Executive Order was provided to the Department of Defense in October 1987, was presented to the Vice President's Task Force on Regulatory Relief in January 1988, and was provided as an attachment as "Basic Regulatory Requirements" to our February 29, 1988 letter to the Department.

The President's Blue Ribbon Commission on Defense Management (the "Packard Commission") raised serious concerns about the

Department of Defense's acquisition of rights in technical data, concerns which in many respects apply Government-wide.

- o The Commission found that contracting officers generally require delivery of technical data even when the need for the data is not identified or when there are other means to achieve the necessary competition that may be less damaging to the contractor's commercial interests and potentially less costly for the Government.
- o The Commission also concluded that the Department's lack of recognition that a mix of public and private funds in developing new militarily useful items or processes is desirable and should be encouraged has resulted in a policy that discourages private investment in such technology.

The Commission stated that the Department obtains technical data that exceed its needs, and thereby removes incentives from innovators to develop and exploit publicly funded technology for commercial use, makes publicly funded technology more readily accessible to foreign competitors, and is out of line with congressional and executive statements concerning inventions made under Government contracts.

The Packard Commission also provided recommended specific policy changes to respond to these concerns.

- o The Department, except for technical data needed for operation and maintenance, should not, as a precondition for buying the product, acquire unlimited rights in data pertaining to commercial products or products developed exclusively at private expense.

"Private expense" as defined by the Commission included funding for the development of an item, component, or process has not been reimbursed by the Government and was not required as an element of performance under a government contract. "Private expense," according to the Commission, should include IR&D and B&P funds, even if reimbursed by the Government.

- o If the Department seeks additional rights in order to establish competitive sources, it should acquire these rights in the least intrusive manner possible, e.g., directed licensing.
- o The Government should be prohibited from acquiring technical data rights pertaining to commercial

products except those technical data, or rights in data, necessary for operation or maintenance of an item, component, or process purchased by the Government.

- o Where significant private funding was provided in a mixed funding case, the developer should be entitled to ownership of the resulting data subject to a license permitting use internally and use by contractors on behalf of the Government. If the Government provides a significant portion of funding, the license should be on a royalty-free basis. In other cases, the Government's use should be provided on a reduced or fair-royalty basis.
- o If the products are developed exclusively with Government funding, the developing contractor should be permitted to retain proprietary position in those data not required to be delivered under contract or, if delivered, not needed by the Government for competition, publication, or other public release.

Objectives of the Regulations

In accordance with these concerns and policies, for the purposes of assessment of the Department's regulation, we have identified five critical objectives of a technical data rights program:

- [1] Provide the necessary protection of a contractor's or subcontractor's proprietary and economic interests in technical data pertaining to an item, component, process, or identifiable subpart thereof developed using private or Government funds.
- [2] Achieve maximum long-term return on our research and development resources by promoting the use of technologies developed with Government funds in the production and marketing of new and improved products and processes for the Government and private markets.
- [3] Increase the long-term competitive base for all procurements by encouraging firms to offer their products with state-of-the-art technologies to the Government as substitutes for products of lower quality or performance and to avoid the loss of technological advantage in our national defense.
- [4] Reduce the Government's direct and indirect costs of managing technical data pertaining to items, components, processes, or identifiable subparts by requiring that, regardless of the source of funding, the Government

obtain royalty-free access to the technical data developed with Government funds rather than physical possession of the technical data.

In certain identifiable cases, the contracting officer should be prohibited from acquiring technical data, such as when the product or process is sold in significant quantities in the commercial market.

- [5] Limit the paperwork requirements to those necessary to meet specifically identified Government needs and minimize the burden on contractors and subcontractors of collecting and providing those technical data to the Government.

The Department's Regulation

[1] Acquisition Procedures. The Department states in the interim rule that, as general policy, it will acquire only the minimum essential technical data and data rights and will acquire them in a manner that is least damaging to the contractor's economic interest. However, the Department's rule lacks the essential regulatory ingredients to implement that policy. To ensure cost-effective defense procurement and to provide the necessary incentives for product innovation and competition, the regulation must provide more specific guidance for the contracting officer on when and how the Government should pursue its rights in technical data and, where appropriate, acquire greater rights in technical data.

These acquisition procedures must be integrated with the provisions of the rule that define the standard rights in technical data, since the Government's specific needs should correspond to the technical data rights acquired--the solution to the particular need or problem. Since these procedures would define how the Government would exercise its rights in technical data, they also should dovetail with the conditions under which the contractor will retain limited rights, obtain Government Purpose License Rights, or provide unlimited rights in the technical data. These procedures will then complement the existing regulatory requirements at 217.72, which specifically direct the contracting officer, after consulting with the other members of a project team, to "decide whether to procure data for future competitive acquisition."

[a] Specific Acquisition Procedures. Since the Department's rule provides only general policy guidance on technical data acquisition, the contracting officer, rather than proceed into uncharted territory, will most likely adopt the standard rights in technical data as defined in Section 227.472-3 of the rule as a "default" procedure. This can easily lead to

acquisition of, or claim to, rights in technical data that exceed those necessary to meet the particular needs of the Department, which in turn will result in losses in technological advantage and long term competition. For example, regardless of whether the Department needs those rights or whether the Department can meet its identified needs in a manner that is less damaging to the economic interest of the contractor, the Department under this rule will obtain unlimited rights in technical data previously delivered with limited rights or Government Purpose License Rights which have expired. Similarly, while the rule provides that "to encourage commercial utilization of technologies developed under Government contracts, the Government may agree to accept technical data subject to Government purpose license rights (GPLR)," because the contracting officer is provided with no specific guidance on when that approach is acceptable, the use of GPLR will be very limited.

To achieve a more effective allocation of rights in technical data, we urge you to include a set of acquisition procedures in the rule. These procedures in effect would serve as a set of screening devices, first to reduce the Department's data rights acquisition to only those specifically needed by the Government, and, second, where access to the technical data is necessary, to ensure that those needs are met in the manner that provides for full consideration of the potential damage to the economic interests of the contractor.

The use of these acquisition "screens" would compel the contracting officer to: (1) identify the need for the data, (2) fit the solution to that need, and (3) include in his determination of the appropriate solution the potential damage to the economic interest of the contractor. For example, technical data pertaining to form, fit, or function, technical data necessary for repair, operation, maintenance, or training activities, technical data prepared or required to be delivered that constitute corrections or changes to Government-furnished data, and technical data otherwise publicly available would be caught by the "first screen" and deemed "unlimited rights" data by the Government. These technical data generally are essential for the effective and efficient operation of the agency. The Department would then further screen the remaining technical data developed exclusively with Government funds to determine those necessary to meet other specifically identified needs. The Department would determine the best means to both meet the Government's specific needs and limit the damage to the potential commercial use of the technology. A "third screen" would identify those technical data developed exclusively with Government funds for which we have no clearly identified need but want to retain the right to obtain access to the data in the future under a deferred ordering arrangement. Technical data pertaining to items, components, or processes

developed at private expense, except in very limited circumstances, should not be acquired by the Department at all. Thus, to continue the above analogy such data should pass through all of the Government acquisition "screens."

In our February 1988 letter, we provided a set of such acquisition procedures. We continue to view these procedures as absolutely essential to meet the objectives of the technical data regulation. We therefore recommend the following as a replacement for Section 227.472-2 in the Department's rule:

227.472-2 Procedures for acquiring rights in technical data:

Regardless of the source of development funding for the item, component, identifiable subpart, or process, before acquiring technical data or rights in technical data pertaining to that item, component, subpart, or process, except as specified in 227.472-3 (a):

(a) The Government should not acquire technical data or rights therein, unless the contracting officer determines that the Government will need to reproduce the item, component, identifiable subpart, or process pertaining to the technical data and none of the following conditions apply:

(1) The original item, component, subpart, or process or a readily introducible substitute that will meet the performance objectives is commercially available;

(2) Performance specifications or samples of the original item, component, or subpart, or demonstrations of the process will provide sufficient information to potential contractors;

(3) The contractor or subcontractor developing the technical data will permit through direct licensing or nondisclosure agreements or other means other potential competitive sources of supply to use the technical data to furnish the item, component, subpart, or process to the Government.

(b) (1) If the requirements of (a) have been met, then the contracting officer should assess whether the expected savings from meeting procurement or other clearly specified objectives through the acquisition of technical data or rights in technical data relating to an item, component, identifiable subpart thereof, or process are likely to exceed: (i) the full costs of acquiring such data or rights in such data, including additional costs to the Government; and (ii) the full

costs of other alternatives (see (a)) and feasible proposals identified in consultation with the contractor or subcontractor that may meet the Government's objectives.

(2) The contracting officer should actively consider the alternative(s) for which the expected net savings (expected savings minus expected full costs) are likely to be maximized. If the expected savings do not exceed the expected costs for any alternative, then the contracting officer should omit such alternative(s) from active consideration.

(3) If, in accordance with the requirements in (a), the contracting officer concludes that acquisition of greater rights in technical data developed at private expense is necessary, the Government should negotiate and enter into a separate agreement with the contractor and include as an express contract provision all limitations or restrictions on its right to disclose the technical data outside the Government.

(c) When the requirements of (a) and (b) have been met and the contracting officer concludes that the acquisition of technical data or rights in technical data is necessary, the contracting officer should negotiate to acquire and use the technical data or rights in technical data to meet its specific needs in a manner that is least damaging to the developing contractor's or subcontractor's identified property rights and economic interests. Such release or disclosure of the technical data by the Government to a third party will be subject to a prohibition against further release, disclosure, or use of such technical data for commercial purposes by the third party unless otherwise permitted by the developing contractor or subcontractor.

The provisions at (a) would prohibit the contracting officer from considering acquisition of technical data when alternatives clearly exist that will meet the Government's needs with less damage to the contractor's economic interest in the technology and less short and long term cost to the Government.

The provisions at (b) would provide guidance to the contracting officer in the assessment of alternatives to Government acquisition and physical possession of technical data. Most importantly, these provisions would encourage the contracting officer to solicit actively proposals from the contractor on how to meet the Government's needs with less damage to the commercial value of the technology. Clearly, if the contractor's proposals do not adequately address the

Government's needs, would require substantial resources to implement and administer, or appear to be frivolous, then the contracting officer would reject them in accordance with the provisions in (b)(2). The dialogue with the contractor as envisioned here would be virtually costless. However, the benefits to the Government are likely to be significant, since this dialogue would promote consideration of all feasible alternatives and reduce the opportunity costs associated with losses of technological advantage and reductions in the competitive base.

The provisions at (c) simply state that, if the Department must exercise or acquire rights in technical data beyond those specified as "unlimited rights" in Section 227.472-3(a), it would provide, wherever possible, protections against further disclosure.

[b] Conditions for Commercial Use of Technologies Exclusively Funded By the Government. The acquisition procedures presented above would be supplemented by more explicit guidance for the contractors and contracting officers regarding implementation of Government Purpose License Rights. The Department's Section 227.472-3(a)(2) should be replaced with the following:

Section 227.472-3(a)(2) It is the policy of the Government to encourage the use of technologies developed under Government contracts for commercialization. When the development of an item, component, identifiable subpart thereof, or process was developed exclusively with Government funds and access by or on behalf of the Government to the technical data relating to that item, component, identifiable subpart, or process is required, the Government will obtain Government Purpose License Rights if: the contractor or subcontractor notifies the contracting officer of its intent to commercialize the technology depicted or described by the technical data, unless the technical data must be publicly disclosed to meet the Government's specifically identified objectives and the requirements of Section 227.472-2 have been met.

(i) Government Purpose License Rights shall be royalty-free and subject to reasonable time limitations as agreed to by the parties. Time limitations are necessary to ensure that the technology embodied in the technical data is not suppressed or abandoned and to offer commercial opportunities to other parties. Time limitations may be determined in part by the contractor's contribution to the development of the technology, the contractor's past history of commercialization of technologies developed under Government contract (if known), likely economic life of

the technology, and an assessment of the potential net social benefits that may be provided by an expansion of commercial opportunities to other parties.

(ii) The Government should negotiate with the developing contractor or subcontractor any procedures (for example, those to be specified in any direct licensing or nondisclosure agreements) that may be required to ensure that the Government has the necessary access to the technical data to meet the Government's competition objectives. These procedures should be specified in an agreement as soon as practicable during the research and development phase of the contract under which the technical data are developed. Such agreements may include an option for any future licensee to purchase technical assistance from the developing contractor. The contracting officer should negotiate payment to be made to the developing contractor in accordance with the costs of providing technical assistance and that contractor's contribution to the development of the technical data.

(iii) If the contractor or subcontractor does not notify the contracting officer regarding an intent to commercialize the technology, does not agree to commercialize the technology within a reasonable time period, or fails to comply with any agreements concerning use of the technical data by or on behalf of the Government, then the Government may obtain unlimited rights in such technical data and all requirements in these regulations that pertain to unlimited rights data will apply.

(iv) If the requirements of Section 227.472-2 have been met and the Government concludes that the acquisition of technical data or rights in technical data is necessary, then the Government should not impose any limitations or restrictions on the contractor or subcontractor's concurrent right to also use the data for its own commercial purposes (unless specifically prohibited from doing so by statute or for national security reasons). Any release or disclosure by the Government to a third party or use by a third party for Government purposes of the technical data to which the developing contractor has obtained exclusive commercial rights will be made subject to a prohibition that the third party may not further release, disclose, or use these technical data for commercial purposes unless otherwise permitted by the developing contractor.

(v) All direct costs incurred by the developing contractor or subcontractor to negotiate the rights to commercialize a technology developed with Government funds and any procedures to provide Government with

necessary access to the technical data are not reimbursable by the Government.

The conditions at (a)(2)(ii) would provide that a contractor, who for a period of time receives the exclusive right to use the technologies developed exclusively with Government funds, would be obligated as appropriate to provide the corresponding technical data to other potential suppliers. The Government and the developing contractor would specify in a contract how an exchange of such technical data would be made between the developing contractor and any potential suppliers. With this approach, the Government would not become directly involved in the distribution of the technical data unless the developing contractor fails to meet the exchange conditions as specified in a contract, in which case he would lose the commercial rights and the Government would claim unlimited rights to those technical data. Clearly, if the contracting officer should have any serious reservations about the long term availability of the technical data, then he could require in a contract that the technical data be placed in escrow.

Under these procedures, the Government's administrative costs to manage, verify, and store the technical data would be reduced substantially. The direct responsibility for maintaining and retrieving the data, for the most part, would be on the contractor, not the Government. Because the developing contractor will be responsible for entering into any nondisclosure agreements (based on a model agreement that would reflect accepted commercial practice) with potential Government suppliers and monitoring such agreements, he will have greater assurance that the technologies in which he has invested substantial resources for further development and marketing will not be used by a potential Government supplier for commercial purposes. The Government would become directly involved in the completion of nondisclosure agreements with potential suppliers only when the Government has taken physical possession of the data and certain limited circumstances apply. Finally, the Government also would be able to allocate its resources to better management of technical data that are necessary for form, fit, and function, operation, maintenance, repair, training of employees, etc.

These conditions of commercial use would impose a threshold determination of the contractor's interest. If the contractor's burden of meeting the conditions of commercial use, including any maintenance and retrieval activities for the purpose of exchange of the technical data with potential suppliers, exceeds the likely benefits to be derived from commercial application of the technology, then the contractor most likely would not ask for Government Purpose License Rights or would receive them with the full understanding that

the Government may disclose the related technical data to potential suppliers for Government purposes, i.e., with higher risk of disclosure.

These acquisition procedures at 227.472-2 and conditions of commercial use at 227.472-3(a)(2) would increase competition in the long term and significantly decrease the Department's procurement lead time. First, more companies would enter the contract process if, as the developing contractor, they would have access to commercially valuable technologies developed under Government contract. Increasing competition in private and Government markets will encourage contractors to take full advantage of technological opportunities, including those provided by the Government. Second, we are likely to see an increase in product availability and innovation, as companies apply technologies developed under Government contract to produce new products or enhance existing ones. Third, we should see faster and more complete delivery of technical data to potential suppliers. The exchange of technical data with potential suppliers would be a contractual obligation of the developing contractor; failure to meet that obligation could result in loss of the contractor's commercial rights and could diminish considerably the return on his investment. Also, we would eliminate the time and resources required for the Government to serve as the intermediary in the data exchange between contractors. For example, if the potential supplier receives a technical data package that appears to be incomplete or inaccurate, then he would immediately contact the developing contractor for clarification of his particular problem and avoid the otherwise elongated process of dealing through the Government. Fourth, because mere delivery of the technical data to a potential supplier is often insufficient, this approach would provide the means for the potential contractors to request directly technical assistance from the developing contractor as part of the exchange of technical data. Such technical assistance would be tailored to meet the particular needs of each potential supplier, since he would pay for any assistance costs. In sum, we would save procurement time and Government resources, would increase competition, and would enhance the effective use of technical data packages.

This approach to Government Purpose License Rights would also be useful in guiding the contracting officer during negotiation of rights to technical data developed with private and Government funds. We would therefore urge the Department to expand the potential use of Government Purpose License Rights or variations thereof to mixed funding situations.

[2] Definitions The new definitions in the rule in Section 227.471 for "developed exclusively at private expense" and "developed exclusively with Government funds" appear to limit

arbitrarily those technical data that will be considered to pertain to an item, product, or process developed at private expense. These definitions seem to thwart indirectly not only the intentions of the Executive Order, but also the requirements of the Defense Authorization Act of 1987 regarding protections for technical data developed at private expense.

[a] Definition of "Developed Exclusively at Private Expense." The Department defines "developed exclusively at private expense" as:

"in connection with an item, component, or process, that no part of the cost of development was paid for by the Government and that the development was not required as an element of performance under a Government contract or subcontract."

The Department then defines "required as an element of performance" as:

"in connection with the development of an item, component, or process, that the development was specified in a Government contract or subcontract or that the development was necessary for performance of a Government contract or subcontract."

Under these definitions, the Department apparently would categorize technical data pertaining to an item, component, or process developed by the contractor solely with his resources as Government funded, as long as that item, component, or process was in any way necessary to complete the tasks defined by a contract or subcontract.

These definitions do not appear to contribute to the achievement of any of the objectives identified previously. The Department's approach clearly will not encourage a contractor to spend his scarce resources to improve performance under a contract or to provide his superior product to meet the requirements of a contract if, as these definitions seem to imply, we intend to deny that contractor the proprietary rights to that technology. The objective of a technical data rights regulation should not be to limit wherever possible those technical data to which the contractor can claim proprietary rights, especially when the such an approach will seriously erode the competitive and technology base available to the Department.

We propose an alternative definition of "exclusively at private expense," which would meet the objectives of a technical data regulation:

"Exclusively at Private Expense" as used in this subpart

means that any of the direct costs of development of the item, component, identifiable subpart thereof, or process in which the technical data are embodied has not been paid in whole or in part by the Government. Government-sponsored independent research and development and bid and proposal costs are not to be considered Government funds. Payments to the contractor for indirect costs incurred under a Government contract are not to be considered Government funds when the direct costs of developing the item, component, identifiable subpart thereof, or process in which the technical data are embodied has not been exclusively funded by the Government."

[b] "Developed Exclusively with Government Funds." The Department defines "developed exclusively with Government funds" as:

"in connection with an item, component, or process, that the cost of development was directly paid for in whole by the Government or that the development was required as an element of performance under a Government contract or subcontract."

By applying two mutually exclusive tests--(1) paid for in whole by the Government or (2) required as an element of performance, the Department could claim unlimited rights to technical data even if the Government played a minor role in the development of the item, component, or process. For example, under the Department's definition, if the development of an item, component, or process was required as an element of performance under a contract, then the Department would claim that the technical data pertaining to the item, component, or process were "exclusively Government funded" even when the contractor provides 99 percent of the development funds.

Furthermore, under this definition together with the definition of "required as an element of performance," the Department could obtain unlimited rights in any technical data, regardless of the mix of funding, as long as the development of the item, component, or process was necessary for the performance of the contract. Consequently, if a contractor develops an item solely using his resources and the item was used in the development of a product for the Government, then the technical data pertaining to the contractor's proprietary item will revert to the Government as unlimited rights data.

The Department's claim of unlimited rights for such technical data will seriously reduce the contractor's incentive to make available to the Government his state-of-the-art technology or to use substantial resources to further develop a product

under a Government contract. The opportunity costs of such a program will be incurred by the Department of Defense, as losses in the competitive and technological base.

We urge the Department to consider an alternative definition of "developed exclusively with Government funds," which would avoid would avoid these costs:

"Developed Exclusively with Government Funds," as used in this subpart, means that the direct costs of development of the item, component, identifiable subpart thereof, or process have been paid in whole by the Government and that such development was specified as an element of performance under a Government contract."

[3] Redundancy and Burden of the Notification Requirements in Sections 227.472-3 and 227.473-1. The Department's rule appears to require at least four separate documents from the contractor or subcontractor regarding the identification of rights in technical data: (a) a "preaward notification" (227.473-1(a)(2)) to identify products or processes that would result in delivery of technical data to the Government with other than unlimited rights; (b) "continual postaward notification" (227.473-1(a)(3)) during performance of the contract prior to committing to the use of a privately developed product; (c) a "certification" (227.473-1(a)(4)) to accompany any response to a solicitation and the notifications of (a) and (b), which is to provide an identification of the contract under which the technical data are or were delivered, the expiration date and limitation on the Government's use, and an authorization for the contracting officer to request additional information to evaluate the assertions; and (d) a "listing" (227.472-3) of technical data delivered with other than unlimited rights as required by the clause at 252.227-7013.

The Paperwork Reduction Act of 1980 as amended (44 U.S.C. Chapter 35) and its implementing regulations at 5 CFR 1320 require that any collection of information from the public cannot be duplicative with any other collection by the Federal Government and that such collections of information must be the least burdensome necessary to meet the Federal agencies clearly identified needs. The notification requirements in the Department's rule do not appear to meet either of these requirements. We recommend that the Department simplify the notification procedures to eliminate the redundancy and reduce the burden.

The listing requirement in Section 227.472-3 and the clause at 252.227-7013 raises other concerns as well. According to the Department's rule, if the contractor mistakenly does not include in this listing technical data pertaining to a

privately developed product, then the Government will claim unlimited rights to those data. Apparently, the Government will claim such rights even if the contractor has legitimately stamped "limited rights" on the technical data package simply because the contractor failed to include the data on the list. This provision is completely alien to the objectives of a technical data rights regulation and may be contrary to the express provisions in the law. With this requirement, the Department seems to be attempting to catch the contractor or subcontractor with an incomplete list and thereby claim unwarranted rights to technical data. The added risk associated with this listing certainly will not encourage contractors to make their state-of-the-art technologies available to the Government and will most likely discourage further development and innovation of technologies developed under Government contract. Further, the added risk provides no new information to the Government, since the list appears to be redundant with the three other notification requirements in the rule.

We would therefore urge that you consider a streamlined approach that will meet the Government's need for information at considerably less cost to the contractor or subcontractor:

227.473-1 Procedures for establishing rights in technical data

(a) Notification. When the technical data pertain to an item, component, identifiable subpart thereof, or process developed exclusively with Government funds, the Government, in accordance with 227.472-3(a)(2), will obtain Government Purpose License Rights for the time specified in an agreement with the contractor or subcontractor. When technical data developed exclusively at private expense are to be used in a Government contract, the contractor or subcontractor, to the maximum practicable extent, should declare the use of such data before the contract is awarded.

(i) If delivery of technical data developed at private expense is expected under a Government contract, the provision at 252.227-7035, "Notification of Limited Rights in Technical Data," shall be included in the solicitation. Under this provision, offerors are required to identify to the maximum practicable extent the use of the items, components, identifiable subparts thereof, processes, or computer software that would result in technical data to be delivered to the Government with limited rights.

(ii) Any technical data delivered to the Government with limited rights must be identified in a contract prior to the delivery of the technical data to the Government. This is necessary for the Government to make informed

judgments concerning the life-cycle costs of alternative means of achieving competitive procurement of items, components, processes, subparts, or computer software and to ensure Government protection of technical data developed exclusively at private expense.

(iii) The Government may challenge in a timely manner in accordance with 227.473-4 assertions by the contractor or subcontractor that the technical data are developed exclusively at private expense.

(b) Identification of restrictions on Government rights.

(i) The clause at 252.227-7035 requires offerors and contractors to notify the Government of any restrictions or potential restrictions on the Government's right to use or disclose technical data pertaining to an item, component, identifiable subpart, process, or computer software that are required to be delivered under the contract. This notice advises the Government of the contractor's or any subcontractors' intended use of the items, components, processes, subparts, and computer software that are required to be delivered under the contract and that: (1) have been developed exclusively at private expense (see 227.472-3(b)); and (2) embody technology that the contractor or subcontractor intends to commercialize (see (227.472-3(a))).

(c) Certification of Intent to Commercialize or to Use Items, Components, Subparts, Processes, or Computer Software Developed with Government Funds. In accordance with 227.472-3, the developing contractor or subcontractor must provide within a reasonable period of time written certification of its intent to commercialize the technology embodied in items, components, subparts thereof, processes, or computer software that have been developed exclusively with Government funds.

(d) Establishing rights in technical data. After receipt of a contractor's or subcontractor's notifications and certifications in accordance with (a), (b), and (c) the contracting officer, when the requirements of 227.472-2 have been met, should enter into agreements establishing the respective rights of the parties in the technical data pertaining to any item, component, identifiable subpart, process, or computer software so identified. The respective rights shall be based on a consideration of the requirements and standard rights as provided in Section 227.472-3 and on negotiations pursuant to 227.472-2 and 227.473-1 and shall be documented to the maximum practicable extent in written agreements made part of the contract. These

agreements should be established prior to the contractor's or subcontractor's commitment to use the item, component, identifiable subpart, process, or computer software, but must be established no later than delivery of the technical data or computer software to the Government. Before agreeing to include any description of rights in technical data pertaining to any item, component, process, subpart, or computer software in the agreement, the contracting officer should assess the reasonableness of the contractor's or subcontractor's assertion and in accordance with the requirements of 227.472-2 consider the likely impacts of such assertion on the Government's needs. After such an evaluation the contracting officer may:

(i) concur with the contractor's assertion and conclude the agreement;

(ii) if the contracting officer has evidence of reasonable doubt about the current validity of the offeror's assertion, submit to the offeror a written request, which includes documentation of the evidence of reasonable doubt, to furnish evidence of such the assertion; or

(iii) if the requirements of 227.472-2 have been met and the acquisition of technical data or rights to technical data is necessary, enter into negotiations with the contractor to establish the respective rights of the parties in the technical data or computer software.

[4] Redundancy of Section 227.473-1(b)(2)(i)(B). This Section in the Department's rule indicates that the contracting officer will not negotiate Government Purpose License Rights if the technical data are needed for immediate competition and protection of the contractor's rights would be "unduly burdensome on the Government."

The application of the first test--needed for immediate competition--is unclear, since the definition of "immediate" is not provided in the rule. It is difficult to imagine a competition that is needed before a contract with the developing contractor is signed by the respective parties. Since the procedures under which the developing contractor would exchange any technical data in which he has a commercial interest should be specified in a contract in the early stages of development, the application of the first test would seem to be a very rare event. This apparently narrow construction is fortunate, if correct, because any other interpretation of "immediate" would seem to unnecessarily discard opportunities for commercial use of technologies developed under Government contract and, hence, result in losses of technologically advanced defense products

for the Government.

The contracting officer will also lack guidance on the application of the second test--unduly burdensome, which also lacks definition in the Department's rule. We would suggest that the rule include guidance to the contracting officer in accordance with the acquisition procedures we provide at item [1][a]. This will clearly articulate the evaluation process that the contracting officer should follow in determining when negotiation is appropriate. Thus, this Section could be eliminated and a reference to our proposed 227.472-2 provided in its place.

[5] Clauses and Reporting Requirements. We would also urge that the Department review and simplify wherever possible the reporting requirements in the rule. In accordance with the Paperwork Reduction Act, information collections in Federal agency regulations must be necessary, must be the least burdensome means to meet the agency's need, and cannot be duplicative with any other Federal collection of information.

Case Management Record

Info
EXOC SEC

DAR Case No. 87303	CAAC No.	Original Updated	Date 6/23/88
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Title **Technical Data**

Reference

Synopsis

Additional Public Comment

Priority	Submitted By	Originator Code	Case Manager
Keywords			
Case References			
FAR Cites			
DFARS Cites			
Cognizant Committees			

Recommendation

TASK TO Committee

Notes



Office of the Controller
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May 24, 1988

Mr. Charles W. Lloyd
Executive Secretary
ODASD (P) DARS
c/o OASD (PL) (MRS)
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Ref: DAR Case 87-303

Dear Mr. Lloyd:

The University of Connecticut wishes to submit the following comments with respect to the interim rule published at 53 FR 10780 under the DFARS Subpart 227.4 - Technical Data, Other Data, Computer Software, and Copyrights and the clause at 227.252-7013.

Our position with respect to data rights on federally funded research is summarized below, followed by our recommended revisions to the interim rule.

UNIVERSITY POSITION

Public Law 96-517, as amended, by giving nonprofit organizations and small businesses the right to own and commercialize patentable inventions resulting from federally funded research grants and contracts, has facilitated stronger research relationships and technology transfer between universities and industry.

University technology, however, involves not only patentable inventions but technical data and software. The absence of a federal policy for technical data and software which parallels that for patentable inventions is a substantial disincentive blocking the effective commercialization of many technologies by U.S. industry.

The University of Connecticut position was presented by COGR representatives in testimony presented on April 30, 1987, before the House Subcommittee on Science, Research and Technology. That testimony strongly endorsed Section 1(b)(6) of the April 10, 1987, Executive Order, "Facilitating Technology Transfer" and is included as Attachment 1.



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UNIVERSITY COMMENTS ON INTERIM RULE

Our comments on the interim rule and recommendations for revision are set forth below and amplified in Attachment 2, General Comments.

Recommendations 1 through 8 would revise the regulations and the applicable contract clause in a manner intended to ensure that the rights acquired by the government from all contractors are adequate to meet essential Government purposes but not so broad as to inhibit the transfer of the technology or discourage industrial companies from investing in its further development and commercialization.

Recommendation 9 is an alternative directed solely at nonprofit contractors. Although we view it as preferable from a university standpoint, it is submitted as an alternative and not as a sole recommendation, in as much as we believe the effective transfer of technology to enhance U.S. competitiveness depends on adopting the same underlying principles for all R&D contractors including industrial organizations and federal laboratories, as we are recommending for universities and other nonprofit institutions.

A. GENERAL ACQUISITION POLICY

The acquisition policy set forth in Part 227.472-1 of the interim rule implies that only the government itself can fulfill its obligations with respect to the dissemination of research results. The University recommends two changes to recognize the traditional and increasingly active role of universities in disseminating the results of Federally funded research.

Recommendations 1 and 2

Under 227.472-1(b) - Add the following sentence:

"Universities and other nonprofit organizations, on the other hand, play an important role in disseminating the results of fundamental research to the industrial sector and government policy should not inhibit that transfer."

Under 227.472-1(c) - Add the underlined phrase so that the second sentence reads as follows:

"When the Government pays for research and development, it has an obligation to foster technological progress through wide dissemination of the information by the Government or through technology transfer programs conducted by the contractor and, where practicable, to provide competitive opportunities for other interested parties."

B. IMPACT OF UNLIMITED GOVERNMENT RIGHTS

Under the interim rule, the government acquires unlimited rights to technical data and to computer software generated in the course of a contract whether or not it pertains to parts, components or processes needed for procurement; whether or not the government has a need for it; and whether or not it has been specified for delivery.

As set forth in Attachment 2, General Comments, this creates major difficulties for the universities by discouraging collaboration with industry

and by requiring the almost impossible task of identifying and segregating technical data and computer software attributable to a specific time period on a research program which has been generating data and software cumulatively over a much longer period. The existence of unlimited rights in the government, whether or not exercised, seriously inhibits the contractor's ability to effectively transfer technical data and software to the commercial sector.

These views are substantially the same as those expressed by Federal laboratory personnel in the GAO study "Technology Transfer - Constraints Perceived by Federal Laboratories and Agency Officials" (GAO/RCED-88-116BR), which was issued in March 1988. An excerpt from that report is included in Attachment 2.

The University believes that any rights which the government obtains in technical data and computer software should be limited to data for which the government has a need which cannot be met by other means or which is specifically required to be delivered under the terms of the contract. We propose the following:

Recommendations 3, 4, 5

3. Minimum government needs. Under 227.472-2, add the following:

"Where the technical data or computer software results from research and development contracts and does not pertain to items, components or processes to be competitively acquired or needed for repair, overhaul or replacement, DOD will encourage dissemination and commercialization by the contractor."

4. Technical data. In the clause at 252.227-7013 under (b) (1), Unlimited Rights, (and in the text at 227.472-3 (a) (1)), revise (i) and (ii) to add the underlined language:

"(i) Technical data pertaining to an item, component, or process which has been or will be developed exclusively with Government funds provided the contracting officer has identified a specific need for the data and that need cannot be met through other means.

"(ii) Technical data resulting directly from performance of experimental, developmental, or research work where delivery of such data was specified as an element of performance under a Government contract or subcontract."

5. Computer software. In the clause at 252.227-7013, under (c) (2), Unlimited Rights, revise (i) and (ii) by adding the underlined language:

"(i) Computer software resulting directly from performance of experimental, developmental or research work where delivery of such software was specified as an element of performance in this or any other Government contract, or generated as a necessary part of performing a contract, where delivery of such software is specified as an element of performance."

C. GOVERNMENT PURPOSE LICENSE RIGHTS IN TECHNICAL DATA

Subparagraph 227.472-3 (a) (2) of the interim rule provides an exception to unlimited Government rights under which the Government may agree to accept Government purpose license rights "To encourage commercial utilization of technologies developed under Government contracts..."

However, (2) (ii) provides that "the contracting officer should not agree to accept GPLR when -

"(A) Technical data are likely to be used for competitive procurement involving large numbers of potential competitors, for items such as spares"; and

"(B) Technical data must be published (e.g., to disclose the results of research and development efforts."

This pairing of competitive procurement and the dissemination of research results as functions for which commercial utilization will not be encouraged is both inexplicable and alarming to the universities. It can easily be interpreted as a specific constraint on the ability of universities to transfer technology generated in the course of basic and applied research programs, which appears diametrically opposed to the President's Executive Order 12591 and emerging Federal policy.

Recommendation 6

We recommend that 227.472-3 (a) (2) (ii) (B) be omitted and a new section, added:

"(iii) When the government does not require immediate use of the data for competition and the contractor is a university or other nonprofit organization which has an interest in commercializing the data, the contracting officer will accept Government Purpose License Rights, which will expire after a specified period of time."

D. GOVERNMENT ACQUISITION OF RESTRICTED RIGHTS IN COMPUTER SOFTWARE

As noted by Federal laboratory officials in the GAO study cited in Attachment 2, General Comments, the effective dissemination of software by those who created it requires the same policies as governs patents. Unlimited government rights have inhibited dissemination and commercialization.

Software generated in the performance of university research, like that created in the Federal laboratories, is normally in a state of continuing development and enhancement that cannot be frozen at a point in time or neatly attributed to specific authors or funding. Its successful dissemination and commercialization frequently requires the continuing involvement of the original authors who created and understand its architecture and the intricacies of its source code. If an institution has established a program for the dissemination of computer software, that institution should be free to pursue it.

Recommendation 7

With respect to computer software, in the clause at 252.227-7013,

revise (c) (1) Restricted Rights by adding a new subparagraph (iii) which would parallel the proposed new subparagraph (iii) under GPLR above:

"(iii) In cases where the Government would otherwise be entitled to unlimited rights, unless the Contracting Officer determines during the identification of needs process that unlimited rights are required for the purposes of competitive procurement of supplies or services, the contracting officer shall agree to accept restricted rights when the contractor is a small business or nonprofit organization which agrees to commercialize the technology."

E. NEGOTIATION FACTORS

As elaborated in Attachment 2, General Comments, it is quite likely that technical data and computer software generated in the performance of university research will be the cumulative result of continuing research conducted over a period of time with multiple sources of funding and may involve the participation of students and others whose effort is supported by university funds or other support. It is, therefore, quite likely that university research will frequently involve mixed funding.

Consequently, it is desirable that some norm be established to guide the negotiation of government-university rights in technical data and computer software.

Under 227-473-1 (b) (2) a series of negotiation factors and negotiation situations are provided as guidance for the contracting officer when negotiating rights in technical data developed with mixed funding or when the Government negotiates to relinquish rights or to acquire greater rights.

The University believes it is essential that guidance be added for situations involving technical data generated in the course of research conducted by universities and other nonprofit organizations.

Recommendation 8

Add the following new subparagraph to (b) (2) (ii):

"(D) When the government does not have a need to use the data for competition and the contractor is a university or other nonprofit which is interested in commercializing the data, the government will negotiate Government Purpose License Rights which will expire if the contractor fails to make reasonable efforts to pursue commercialization."

F. AN ALTERNATIVE RECOMMENDATION - ADOPT ALTERNATE II

Technical data and computer software generated in the course of university research rarely involves the competitive procurement of items, components, parts, and processes. Consequently, data regulations focused primarily on competitive procurement are particularly inappropriate for university research. Modifying those regulations so that they do not inhibit the transfer of technology between universities and the commercial sector is exceedingly difficult.

The applicable clause, 252.227-7013, does contain, in Alternate II, provisions that would be significantly more appropriate and workable for university research than those addressed above. Part 227.479 Small Business Innovative Research Program (SBIR Program), in response to Public Law 97-219, requires in subparagraph (d) that the clause at 252.227-7013, with its Alternate II, shall be included in all contracts awarded under the SBIR Program which require delivery of technical data or computer software.

The following recommendation is, therefore, provided as an alternative to recommendations 4 through 8, set forth in B through E above:

Recommendation 9

Establish a new section 227.483 providing colleges and universities with rights in technical data and computer software comparable to those provided in Section 227.479 for the SBIR Program; or modify Section 227.479 by revising the title to read "Small Business Innovative Research Program (SBIR Program) and University Research Programs"

Add the following new paragraph (e):

"(e) The clause at 252.227-7013, Rights in Technical Data and Computer Software, with its Alternate II, shall be included in all contracts awarded to colleges and universities for the conduct of basic or applied research, which do not require the delivery of technical data or computer software needed by the Government for the competitive procurement of items, components, or processes."

In Section 227.471, Definitions, modify the definition of Government Purpose License Rights to read in Part:

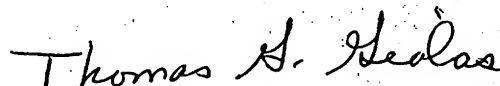
"and in the SBIR Program and for colleges and universities, computer software....."

We appreciate the opportunity to comment.

Sincerely,



Richard J. Carterud
Director Office of Grants & Contracts



Thomas G. Giolas
Dean of the Graduate School and
Director of the Research Foundation

Attachment 1 - TESTIMONY

COMMITTEE ON SCIENCE, SPACE AND TECHNOLOGY
SUBCOMMITTEE ON SCIENCE, RESEARCH AND TECHNOLOGY
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

FACILITATING ACCESS TO SCIENCE AND TECHNOLOGY

BY

GEORGE H. DUMMER
DIRECTOR, SPONSORED PROGRAMS
MASSACHUSETTS INSTITUTE OF TECHNOLOGY

ON BEHALF OF THE COUNCIL ON GOVERNMENTAL RELATIONS

APRIL 30, 1987

There are many answers because they are many elements which are essential to the transfer process. One of them, however, is a government policy which provides at the outset, not through the waiver process, that -

The ownership and the right to disseminate the research result and transfer the technology remain in the university which created it, and

The rights acquired by the government are adequate to meet essential government purposes, but not so broad as to inhibit the transfer of the technology or discourage industrial companies from investing in its further development and commercialization.

And the government has, at least in part, had such a policy since 1980, when P.L. 96-517 gave nonprofit organizations and small businesses the right to own and to commercialize patentable inventions resulting from Federally funded research grants and contracts.

Impact of P.L. 96-517

In my view, P.L. 96-517 and the amendments of P.L. 98-620, have had a significant and positive impact, starting with the elimination of some 26 different Federal patent policies, many of them involving the cumbersome waiver procedures which large business contractors find so troublesome today.

In addition, P.L. 96-517 has facilitated stronger research relationships between universities and industry. It has also encouraged the creation or expansion of university activities directed toward the transfer of university generated technology:

The MIT Technology Licensing Office which Mr. Preston directs is typical of the kind of activity in which a growing number of universities are engaged. It involves the transfer of technology by individuals with technical backgrounds and business experience who understand both the technology and the complications of transferring it to the commercial sector.

Dealing with Multiple Intellectual Property Rights

As universities have become more active in technology transfer, however, it has become increasingly obvious that the effective transfer of university generated technology requires dealing with a combination of intellectual property rights.

For example, a number of universities, including MIT, are working on nuclear magnetic resonance (NMR) imaging devices because, unlike x-rays used in CAT scans, magnetic fields have no known toxic side effects. But to achieve the accuracy of CAT scanned images requires a sophisticated and integrated hardware and software system.

- Any rights which the government obtains to technical data or software be limited to rights in data specifically required to be delivered or prepared under the terms of the contract or grant; and
- The Government acquire a royalty free license to use such technical data or software for specific government purposes, but not including the right to use it in a manner which might inhibit the transfer and commercialization of the technology by the university which created it or by the university's licensees.

Attachment 2 - GENERAL COMMENTS

1. GOVERNMENT ACQUISITION OF UNLIMITED RIGHTS TO ALL DATA GENERATED

The Government's acquisition of unlimited rights to technical data and computer software under 227.472-7013, which extends to everything generated, originated, developed, etc., in the course of a contract, is so broad that it creates a number of serious difficulties for universities and for other organizations performing Government research contracts.

Discouraging University-Industry Interactions

Prior to the passage of Public Law 96-517, many industrial companies were reluctant to support university research in areas of concurrent federal support. There were a variety of federal policies with respect to rights in inventions and no assurance in many that the university would be permitted to retain title and to license the industrial sponsor on an acceptable basis. Where rights could only be acquired by a time-consuming waiver process, there was no certainty of success. After the passage of P. L. 96-517, when the universities were in a position to retain title to inventions resulting from Federal projects and license them on reasonable and predictable terms, industrial companies showed significantly more enthusiasm for funding research in areas of Federal interest and acquiring license rights and reduce to practice those inventions which were conceived with Federal research funding.

The same situation exists today with respect to computer software and other technical data as existed for patentable inventions prior to 1980. Industrial companies are reluctant to fund the development of software at universities when a Federal agency acquires unlimited rights in all software developed, whether or not the government has a need for it, and is in a position to make that software available to all comers without restriction.

These views are substantially the same as those expressed by Federal laboratory officials as reported in the GAO study "Technology Transfer - Constraints Perceived by Federal Laboratories and Agency Officials" (GAO/RCED-88-116BR), which was issued in March 1988. As summarized in the transmittal letter (B-207939) to that report, the findings dealing with computer software are as follows:

"In summary, the federal laboratory and agency officials we interviewed support the thrust of legislation and executive actions during the past 10 years to improve the link between the federal laboratories' technology base and U.S. business. These laws authorize federal laboratories to patent and exclusively license inventions and collaborate with businesses on research and development. Many of these officials stated, however, that the four identified constraints need to be addressed to further improve the effectiveness of their laboratories' technology transfer efforts. They believe that removing or reducing these constraints would (1) provide more incentives to transfer computer software technology to U.S. businesses, (2) encourage U.S. businesses to make better use of federal laboratory resources, and

research team an opportunity to advance the state of the art. Consequently, the data and software which it generates is the cumulative results of a continuing program which cannot be frozen in time.

FCCSET Policy Statement

In sharp contrast to the policy reflected in the interim rule, a government-wide data policy statement developed (but never issued) by a subcommittee of the Federal Coordinating Council for Science, Engineering and Technology (FCCSET) contained the following statement in its February 1985 revision. Although the subcommittee was disbanded before issuing a final policy statement, the language is particularly realistic from a university standpoint:

"...It must also be recognized that in many cases the data will build upon past experience, expertise, know-how and organizational abilities which the contractor or subcontractor brings to the project. As a practical matter, it is not likely that a meaningful segregation can be made between the know-how and expertise generated under the contract and the know-how and expertise which the contractor previously possessed and applied to the contract."

" Any rights which the government obtains to technical data will be limited to rights in data specifically required to be delivered or prepared under the terms of the work statement, reporting requirements, or specifications of the contract or grant. Broad and sweeping terminology giving the government rights in 'all data first produced or generated in the course of or under this contract' or 'in all data generated under this contract whether or not delivered' should be avoided."

This, of course, is particularly true of software, which is constantly being developed, refined, debugged, enhanced, used for derivative works, and issued and reissued in successive releases.

Attachments

cc: President Casteen
Interim Provost McFadden
Interim V.P. for Finance Popplewell

Case Management Record

See - send 2
copies to Mr. Sumner

EXOC SOC

DAR Case No. 87-303	CAAC No.	Original Updated	Date 6/15/88
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Title Tech DATA

Reference

Synopsis

Public Comments

Priority	Submitted By	Originator Code	Case Manager
Keywords			
Case References			
FAR Cites			
DFARS Cites			
Cognizant Committees			

Recommendation

Notes

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Ronald W. Hodges
General Manager
Military Programs

May 24, 1988

DEFENSE ACQUISITION REGULATORY COUNCIL
The Pentagon, Room 3D139
Washington, D.C. 20301-3062

Attention: Mr. Charles W. Lloyd, Executive Secretary
ODASP (P) DARS, c/o OASD (P&L) (MRS)

SUBJECT: DAR CASE 87-303, INTERIM RULE ON RIGHTS IN
TECHNICAL DATA

The BFGoodrich Company, Aerospace and Defense Division, Aircraft Wheel and Brake Operations, develops, manufactures, and supports aircraft wheels and brakes for commercial, general aviation, and military customers worldwide. One of the keys to the success of our business in all of these markets is that all of our technical data has been developed by us at our expense. However, legal and regulatory changes over recent years have threatened to erode or outright destroy our position with respect to proprietary data in the military market.

Because of the need to protect our past and continuing investment in proprietary technical data we, along with several other companies, have become members of the Proprietary Industries Association (PIA). We have reviewed the comments on the interim rule prepared by PIA and endorse their position.

We would like to emphasize, in particular, BFGoodrich's objection to that part of the definition of "Developed Exclusively at Private Expense" which reads "... the development was not required as an element of performance of a Government contract or subcontract." First, this language would essentially require a contractor or subcontractor who wanted to declare his data for an item to be proprietary to know whether any Government contract or subcontract with any contractor or subcontractor ever required or was requiring the development of the same or equivalent item. This is not possible. Second, the language is not clear if the development required was to be performed at any time during or before the contract. It seems reasonable to conclude that the use of an item, developed at private expense but used in the performance of a Government contract or subcontract would be declared

DEFENSE ACQUISITION REGULATORY COUNCIL

May 24, 1988

Page 2

not to be developed exclusively at private expense, only because its development could have been interpreted as having been required under a particular contract or subcontract.

The offending language should, therefore, be removed from the definition. Because of the reasons cited above, the additional language within the same definition which reads "All indirect costs of development are considered Government funded when development was required as an element of performance in a Government contract or subcontract" should be deleted.

We appreciate the opportunity to comment on this most important subject.

Sincerely,

THE BFGOODRICH COMPANY



Ronald W. Hodges
General Manager, Military Programs

/ph

National Tooling & Machining Association



June 9, 1988

HAND DELIVERED

Mr. Charles Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
ODASD(P) DARS
c/o OASD(A&L) (MRS)
Room 3D139
The Pentagon
Washington, D.C. 20301-3062

RE: DAR Case 87-303

Dear Mr. Lloyd:

The National Tooling & Machining Association appreciates this opportunity to submit these comments on the proposed revisions to DoD FAR Supplement provisions implementing the Fiscal Year 1988 Defense Authorization Act, P.L. 100-180, section 808.

NTMA represents the tooling and machining industry. This industry is composed of 14,000 plants almost all of which are small business concerns. These companies build special tools, dies, jigs, fixtures, molds, gauges, special machines (automation, robotics, and production lines) and precision machine parts or components. They use a wide variety of equipment and processes, including most machine tools from the simplest lathe to complex electrical-chemical milling, and electron-beam welding. They commonly achieve tolerances to one ten-thousandth of an inch and regularly use computers as an aid in design, machining, and control of operations.

The tooling and machining industry is the cornerstone of modern mass production. The 14,000 companies in the industry serve virtually every other industry in the nation, from automotive to aerospace. Without the services of these thousands of highly competitive small companies mass production would not exist.

NTMA member companies are ready, willing and able to provide DoD with high quality spare parts at a fraction of prices presently paid and with materially shorter lead times. However, they have been repeatedly precluded from bidding because the Government has incomplete data or because of prime contractor claims to rights in data.

Less than 10% of the approximately \$19.5 billion spent by the DoD on spare parts is awarded through open competition. Considering that costs savings of almost one-half have repeatedly been documented when spare parts contracts are openly competed the need for Government ownership of data rights is obvious.

At the outset we note the difficult position in which the DAR Council is placed by recent legislative developments.

It made no sense for Congress in section 953 of P.L. 99-500 to weaken the rule requiring complete development at private expense at a time when technical data problems remain the greatest barrier to competitive spare parts contracts. For example the Air Force Logistics Command has screened 255,420 of the 873,420 parts in its inventory for possible competitive procurement and determined that not even restricted competition could be used to purchase 147,682 parts. Of these totally noncompetitive procurements, 73.5% were caused by data problems. More specifically, 34,545 parts or 23.4% of the noncompetitive purchases were because of proprietary claims, 28,791 parts or 19.5% were because there was no technical data in the Government's possession and 45,304 or 30.6% resulted from incomplete data. It would appear that about 50% of these dollars spent without even restricted competition were caused by proprietary claims since proprietary claims are the cause of most incomplete data situations.®

® AFLC Summary for Fiscal Year 1985. A 1984 Report of the OSD Technical Data Study Group entitled "WHO SHOULD OWN DATA RIGHTS: GOVERNMENT OR INDUSTRY?" is cited for the proposition that only 4.1% of the parts in DoD's spare parts inventory are purchased noncompetitively because of proprietary claims. This figure is misleading for several reasons. First, in arriving at this figure the Study Group did not include the 26.7% of the parts which are coded "H" for incomplete data. As indicated by Oklahoma City Air Logistics Center Competition Advocate John Schultz, most incomplete data situations involve proprietary claims. Second, by considering the entire DoD spare parts inventory, jet engine parts are considered the same as nuts and bolts which obviously are not proprietary. A better measure of the impact of proprietary claims on competitive procurement would be to consider the dollar value under each procurement code. Finally, the study does not consider the numerous cases where proprietary claims cause competition to be restricted to approved sources, e.g.- a prime and its economically dependent subcontractor.

In addition, virtually all technical data is received for competitive review more than three years after final payment or delivery of the data. It clearly makes no sense to devote manpower to reviewing data rights until it is known what spares are needed. It is also clear that the DoD does not have the resources to review data rights claims in the limited time now permitted.

We recognize that these are points for Congressional rather than regulatory action. However within the Congressional constraints of P.L. 99-500 and P.L. 100-180 we believe there is room for improvement in the proposed regulation.

Our comments are set forth below after a background discussion concerning the evolution of DoD data rules and what is needed by small businesses to compete for spare contracts. A complete understanding of what is needed for small businesses to compete is essential because this rule should not place more barriers than those mandated by P.L. 98-525 to those small businesses attempting to compete for DoD spare parts contracts and licensed foreign requirements.

I. Background

A. Historical Perspective

1. Rules Promulgated by DoD in 1964

The basic rules concerning the acquisition of technical data were promulgated by DoD in May 1964 in Defense Procurement Circular 6 and remained essentially unchanged until the recent enactment of Public Law 99-500. In order for a contractor to properly affix a limited rights legend to technical data under this longstanding rule, the data must pertain to an item, component or process that was (1) a trade secret (2) developed (3) at private expense.

"Developed" was interpreted as meaning brought to at or near the point of practical application. In order for an item to have been considered as developed at private expense all development was required to have been at private expense. In other words, if the development of an item was funded with a mixture of Government and private funds, the Government obtained unlimited rights in data.

Standard clauses have long required a contractor to substantiate its claims to rights in data by clear and convincing evidence for as long as it asserted them.

2. The Defense Procurement Reform Act of 1984

Congress enacted the Defense Procurement Reform Act of 1984 as part of the FY1985 DoD Authorization Act, P.L. 98-525. The Act resulted from the immense cost to the taxpayer of noncompetitive spare parts procurements, many of which resulted

from spurious contractor claims to rights in data. P.L. 98-525 added 10 U.S.C. 2320 and 2321 which are respectively entitled "Rights in technical data" and "Validation of proprietary restrictions" to the Armed Services Procurement Act.

10 U.S.C. 2320 (a) required the promulgation of regulations defining legitimate proprietary interest. For the first time 10 U.S.C. 2321 provided a statutory mechanism for challenging contractor proprietary claims.

DoD proposed rules to implement P. L. 98-525 in the Federal Register of September 10, 1985. Just as the regulations promulgated by DoD in 1964, the regulations proposed under Public Law 98-525 would have permitted limited rights legends only to be placed on technical data for items developed completely at private expense. Those proposed regulations followed the interpretation of then existing rules. In order to be considered as developed at private expense under the 1985 proposed regulation, an item would have had to have been brought to the point of practical application. The proposed rules also required "completed development ... without direct Government payment" in order for a contractor to claim proprietary rights. This was consistent with the requirement that an item be brought to the point of practical application in order to be patentable and restated the rule under which the Government obtained unlimited rights when development was accomplished with a mixture of Government and private funds.

NTMA was generally pleased with the proposed implementation of the technical data provisions contained in P.L. 98-525 and 98-577. As stated in our October 1, 1985 comments "It is to the credit of the Defense Acquisition Regulatory Council that these proposed regulations show an inclination to protect the taxpayers interest."

The regulation proposed under P.L. 98-525 was opposed by contractors intent on using the Competition in Contracting Act as a vehicle to increase their rights in data rather than competition. DoD officials publicly stated that they had no intention to use the Competition legislation rules to abolish the requirement of complete development at private expense in order for a contractor to obtain rights in data. The regulation was never promulgated in final form.

3. FY 1987 Defense Authorization Act "Technical Amendments"

Thwarted by the P.L. 98-525 rulemaking proceedings, lobbyists for large defense contractors accomplished their objectives through the enactment of purported technical amendments in the FY 1987 Defense Authorization Act, P.L. 99-500. These provisions materially weakened the DoD's ability to obtain rights in technical data needed for competitive procurement.

Not surprisingly this legislative attack on the taxpayers' interest was enacted without the benefit of public hearings. On the House side it was added in markup in a provision described to members as a "technical amendment". On the Senate side it was enacted as the result of a floor amendment.

The Rights in Technical Data provisions enacted in Public Law 99-500 constituted the most drastic change in DoD data policy since Defense Procurement Circular 6, which provides the basis for current rules, was promulgated by DoD in 1964. The P.L. 99-500 data rules are inconsistent with the P.L. 98-525 remedial measures enacted by Congress to reduce DoD's reliance on costly, noncompetitive spare parts contracts. More specifically, P.L. 99-500 weakens the Government's position with respect to contractor rights in data in two significant areas.

First, contrary to long established precedent, data rights are left up to negotiations where development results from a mixture of Government and contractor funding. As previously noted, under long-standing interpretations, the Government previously obtained unlimited rights to use such data for competitive procurement.

Second, P.L. 99-500 for the first time places a time limit on the Government's right to challenge contractor data rights claims.

Public Law 99-500 was silent as to the standard of proof necessary to justify claims to rights in data. However, at the behest of large aerospace contractors, DoD reduced the standard of proof necessary to support claims to rights in data from "clear and convincing evidence" to "sufficient evidence."

4. Executive Order 12591

On April 10, 1987, President Reagan issued Executive Order 12591 entitled, "Facilitating Access to Science and Technology." Section 1.(b)(1) of the Executive Order requires Federal agencies, "to the extent permitted by law", to "cooperate, under guidance provided by the heads of other affected departments and agencies in the development of a uniform policy permitting Federal contractors to retain rights to software, engineering drawings and other technical data generated by Federal grants and contracts, in exchange for the royalty-free use by or on behalf of the Government.

5. The FY 1988 Defense Authorization Act

Additional data rights provisions appeared in the Fiscal Year 1988, Defense Authorization Act, P.L. 100-180, section 808. More specifically, 10 U.S.C. 2320 was amended to provide as follows:

-all indirect costs paid for by the Government will be treated as "private expense";

-contractors cannot be barred from using items, components or processes developed at private expense;

-a contractor may not be barred from receiving a fee from a third party for the use of data relating to items, components or processes developed at private expense;

-DoD may achieve competition by contracting for the direct licensing of alternate sources;

-rights in mixed funding data are required to be negotiated except where a determination is made that negotiation is impracticable;

-DoD is to issue rules for negotiating rights in data.

DoD issued interim rules implementing these statutory provisions on April 1, 1988 in order to comply with the Congressional deadline to issue implementing regulations.

B. DoD Can Save Billions Through Competition

About 90% of DoD spare parts are coded for noncompetitive procurement or for procurement through restricted competition. The dollar value of DoD spare parts purchased through open competition is much less than the 10% of the parts purchased using open competition since the 10% figure represents mostly low dollar items.

Studies have shown repeatedly that DoD saves almost 50% when parts are openly competed. There is a potential for savings billions of dollars since DoD purchases approximately \$19.5 billion in spare parts annually.

C. What Small Businesses Need to Compete

Small businesses are ready, willing and able to provide high quality spare parts at a fraction of the prices presently paid and with materially shorter lead times. However they are prevented from doing so by noncompetitive DoD practices. Small businesses do not need set-asides to compete since they invariably win out over original equipment manufacturers when allowed to compete. Small businesses need just three things to compete: (1) timely notification of procurement opportunities, (2) timely access to adequate technical data and (3) engineering source approval based on engineering principles rather than bureaucratic whim. A brief description of each of these items is provided below.

1. Notification of Procurement Opportunities

Since small businesses cannot afford on-site representation at procurement activities they are forced to rely upon the Commerce Business Daily to learn of procurement opportunities.

However, problems often occur because an item is not synopsized in the CBD or, not timely synopsized, or the synopsis is misleading.

Despite the enactment of P.L. 98-72 and 98-369, CBD synopses continue to be a barrier to competition. All too often purchases are not synopsized because of purported "urgency". Noncompetitive procurements also occur because synopses which are presumed to have been made by regulation have not been made. See FAR 5.203(f). Also impeding competition is an Air Force regulation providing that only six items need be synopsized if multiple items are purchased in one contract. AF FARS 5.207 (b)(4)(iii).

2. Timely Access to Technical Data

After locating a contracting opportunity in the Commerce Business Daily, small businesses request a copy of the solicitation from the procuring activity. However, all too often they will be told that none can be provided because the supply is exhausted. This practice exists despite the fact the law (15 U.S.C. 637b) requires that small businesses be given a copy of bid sets and specifications upon request.

Even if a small business is fortunate enough to timely obtain a solicitation, it often will not contain the government owned technical data needed to manufacture the contract end item. This practice may be seen in solicitations for the 90% of DoD spare parts assigned restrictive procurement method codes. For these DoD spare parts contracts potential bidders are referred to DoD data repositories to obtain the Government owned data needed for bidding. These requests are made by small businesses under the Freedom of Information Act (FOIA).

The problem with DoD data repositories is that although the bidding period is normally just thirty days, the repositories take much longer to respond to data requests. For example the Navy often takes a year to respond to data requests and the Air Force several months. In order to obtain technical data in time to bid many small businesses rely on commercial data brokers. These data brokers facilitate competition by making data available to would be bidders by overnight mail.

When the DoD data repositories do respond they will often not provide data because it contains a limited rights (proprietary) legend. In the past many prime contractors routinely marked items as proprietary even if they were not because proprietary claims were never challenged. Small businesses have successfully used the FOIA to remove thousands of prime contractor proprietary legends.

3. Engineering Source Approval

Prequalification is a major impediment to small business participation in the procurement process. The military argues that prequalification is necessary to assure that quality end items are received. However, prequalification is a costly, ineffective quality control technique. Prequalification provides no assurance that a quality end item will be received and only restricts competition, often to just one source. True quality control cannot be achieved through qualified bidders or products lists, but only through recognized quality control techniques such as management, regular instrument calibration, good specifications and conformance testing.

Prequalification requirements are often adopted by DoD as a result of a recommendation from the very large defense systems manufacturers that benefit from a noncompetitive procurement. The most frequent rationale is that unique manufacturing capabilities are needed. This argument is dubious since the large prime contractor recommending prequalification most often does not manufacture the part in question, but subcontracts it to one or more small business concerns. Often DoD tells small businesses which wish to prequalify to obtain engineering approval from the large defense systems manufacturer they wish to bid against. This is a commercially impracticable requirement.

II. The Proposed Rules Implementing Public Law 100-180

A. Government Purpose License Rights

The regulations extend the potential application of "government purpose license rights" to those items developed entirely at Government expense. "Government purpose license rights" give the Government the right to use, duplicate, or disclose technical data for Government purposes only and to have or permit others to do so for Government purposes only. Under the proposed regulation, government purposes include use by the government for a competitive procurement.

1. Government Purpose License Rights Should Include Release to Potential Bidders on DoD and Licensed Foreign Requirements Before a Solicitation is Issued

If the Government purpose license rights concept is retained, the definition of Government purpose should expressly include the right to provide such data to potential bidders on DoD contracts and licensed foreign military requirements even if no solicitation has been issued. The regulations should make it clear that access is available to would be bidders as a right under the FOIA and 15 U.S.C. 637b which provides that small businesses shall be provided bid sets and specifications upon request. The regulations should also provide that data subject

to Government purpose license rights be included in solicitations. For the reasons previously discussed, this alone does not assure access in time to bid.

2. Government Purpose License Rights Should Include Right to Release to Commercial Technical Data Services for Sale to Potential Bidders

The definition of Government purpose license rights in DFARS 227.471 is limited to the right to use, duplicate or disclose for Government purposes and "the right to have or or permit others to do so for Government purposes only." The right to have others to do so should expressly include the right to make data available to commercial technical data services for sale to would be bidders on DoD contracts and licensed foreign requirements.

This clarification is necessary because of the inefficiency of DoD data repositories make commercial technical data services an essential part of the procurement system. As noted previously, in order to compete and obtain required engineering source approvals, small businesses need access to data before a solicitation is issued. In addition although the bidding period is normally just 30 days data cannot be accessed from DoD data repositories during this period. In contrast commercial technical data services provide data on an overnight basis.

In order to avoid any misunderstanding by those implementing the regulations, it should be made clear that technical data services are entitled to Government purpose license data as a matter of right under the Freedom of Information Act and 15 U.S.C. 637b.

3. Nondisclosure Agreements

Even absent additional bureaucratic entanglements, DoD data repositories are unable to provide data in time to bid. Rather than attempting to resolve this barrier to competition, Congress and DoD continue to come up with additional barriers to the prompt dissemination of bidding data.

A recently enacted unintended barrier to prompt dissemination of bidding data is section 913 of the FY 1984 Defense Authorization Act. This provision, which is codified at 10 U.S.C. 130c, gives DoD the authority to withhold from public disclosure certain data subject to export control. DoD Directive 5230.25, which implements 10 U.S.C. 130c, requires contractors to become certified U.S. contractors in order to obtain data.

DoD routinely uses DoD Directive 5230.25 to withhold data -- even from firms that have gone through the mandated process of becoming certified U.S. contractors. When requests are received, prolonged delays occur while DoD attempts to

determine if data is subject to Directive 5230.25 and if so whether it is within the scope of a firm's certification statement.

The DAR Council is to be commended for providing in section 227.473-1(c)(2) of the interim DFARS for the use of standard nondisclosure agreements where Government purpose license rights are obtained. Under prior rules, the terms of nondisclosure agreements were left to the unbridled discretion of original equipment manufacturers, which stand to benefit when such data is unavailable to potential competitors.

However, the nondisclosure agreement provisions set forth in the proposed technical data regulation still add one more bureaucratic impediment to the release of bidding data. Such an agreement seems to be required to be executed each time a contractor obtains Government purpose license rights data.

In order to facilitate prompt release of bidding data we strongly recommend that any such agreement be limited to a master agreement with the Government covering all Government purpose license rights data, rather than serving as an impediment to obtaining data needed for bidding each time a request is made. The execution of such an agreement should be coordinated with a firm's registration under DoD Directive 5230.25 as a certified U.S. contractor.

Potential bidders on DoD contracts and licensed foreign requirements, as well as commercial technical data services, should be permitted to enter into such agreements.

For the reasons previously noted, it is essential such agreements provide for pre-solicitation access to government purpose license rights data to potential bidders on future DoD contracts and licensed foreign military requirements. Such access should be available under the Freedom of Information Act and 15 U.S.C. 637b.

4. Alternate Approach to Nondisclosure Agreements

The DAR Council has requested comments on a possible alternative approach to non-disclosure agreements. Under the proposed alternative approach a solicitation provision would notify offerors that a solicitation contains technical data subject to restrictions on further use and disclosure and would require offerors to safeguard the data which would be marked with appropriate restrictions.

The provision fails to recognize the need of small businesses to obtain technical data before a solicitation is issued in order to compete. This need has been previously discussed at length. For this reason NTMA would prefer a one time execution of a standard agreement that covers all Government purpose rights data that a contractor requests in the future.

B. The Clear and Convincing Evidence Standard Should be Restored

Interim DFARS section 227.447-4 (c) provides that restrictions on the Government's rights in data can be challenged by the contracting officer in accordance with the procedures set forth in the clause appearing at DFARS 252.227-707. This clause permits the Government to require a contractor to provide "sufficient evidence" to justify its proprietary claim.

Prior to the promulgation of rules implementing P.L. 99-500, the standard of proof set forth in regulations dating back to 1964 is "clear and convincing evidence." There is no indication in the legislative history that Congress intended to modify the longstanding clear and convincing evidence standard.

The requirement that contractors justify data rights by clear and convincing evidence is necessary because all facts needed to justify claims to rights in data are in the possession of the contractor claiming rights in data.

The clear and convincing evidence test should also be retained to prevent confusion. The sufficiency standard is unduly vague. "Clear and convincing evidence" is an established legal standard. There is no established legal definition of "sufficient" legal evidence.

C. Validation of Restrictive Markings

Section 227.473-4 sets forth procedures for restrictive markings. Our recommendations with respect to this section are as follows:

1. The Statutory Provision Requiring a "Thorough" Review of Rights in Data While DoD Has the Right Should Be Implemented

Public Law 99-500 drastically departed from prior law for the first time by placing a time limitation on the Government's right to challenge contractor claims to rights in data. The time limitation is the later of three years after final payment or delivery of the data. Previously the Government could challenge contractor data rights claims for as long as they were asserted.

In order to assure that the taxpayer's rights are protected the legislation required the Secretary of Defense to assure "a thorough review" within this period of "the right of the United States to release or disclose technical data delivered under a contract to persons outside the Government, or to permit the use of such technical data by such persons." This review requirement clearly applies to Government purpose license rights claims as well as limited rights claims since they impinge on the Government's right to make data available to persons outside the Government.

Although the interim regulation requires that a "review" be made within the statutory period, it should also require that such a review be "thorough", as required by statute.

2. The Prechallenge Review Procedure Should be Made Optional with the Contracting Officer

Interim DFARS 27.473-4(b)(1) provides that the "formal" data rights challenge provisions may be invoked only after the contracting officer requests information concerning rights in data from the contractor and any interested Government activities. This procedure would unnecessarily delay the removal of improper claims of rights in data since it appears to require the contracting officer to go through the pre-challenge review procedures even where he already has probable cause to challenge a contractor's proprietary claim. This provision, which is not a part of the statute being implemented, is not in the Government's best interest and should be eliminated.

3. Limitations on the Government's Right to Use Data After a Contracting Officers Decision Removing Restrictive Legends Should Be Eliminated

The proposed regulation provides that the Government will not use data even after a contracting officer decision removing restrictive legends if either a contractor within 90 days (1) appeals to the Board of Contract Appeals or (2) indicates it will appeal to the U.S. Claims Court within one year. After a suit is filed it provides that the data will not be used for competitive procurement until a final decision is issued.

These provisions, which do not appear in either Public Law 98-525 or 98-577, would allow a contractor to delay having to face competition indefinitely and should be eliminated. Although the proposed regulations provide the data can be used upon a finding of "urgent or compelling circumstances" by the head of the agency in practice this is of little practical value to a contracting officer.

Under the proposed regulations it would be to a contractor's advantage in every instance to indicate it would file suit in the U.S. Claims Court within one year. Even if suit is never filed it delays release of data for one year without any penalty.

If suit is filed it can easily take years for a decision on the merits. Technical data litigation has in the past been characterized by repeated requests for extensions by contractors. It also should be noted that a Board of Contract Appeals or U.S. Claims Court decision is not final until any appeal to the U.S. Court of Appeals for the Federal Circuit is decided.

These provisions give the contracting officer less power to challenge claims to rights in data than that available to members of the public under the Freedom of Information Act. Under the

FOIA the Government is required to promptly release data absent adequate justification for any proprietary claims.

If the validation provisions were promulgated in their present form a contracting officer desiring to challenge questionable data rights claims would be better off submitting an FOIA request for the data. This is obviously not what Congress intended when it enacted Public Laws 98-525 and 98-577.

It also should be noted that these provisions are not necessary to provide a contractor with an adequate remedy at law. If a contracting officer decision removing a restrictive legend is overturned a contractor is entitled to recover damages for any pecuniary loss.

D. Developed Exclusively at Private Expense

As previously noted in order for a contractor to be automatically entitled to claim limited rights in data an item must be "developed exclusively at private expense." DFARS 227.471 defines "developed" as meaning that "the item component, or process exists and is workable." The interim regulation further states that "Workability is generally established when the item, component or process has been analyzed and or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended." This is less stringent than the standard of "brought to the point of practical application" set forth in the proposed regulations implementing Public Law 98-525, which was bitterly fought by large aerospace contractors.

We strongly urge the DAR Council to adopt its earlier proposed formulation. There is no statutory basis for the DAR Council's change in position. The formulation in the earlier proposed regulation is consistent with the requirement that an item be brought to the point of practical application in order to be patentable. The reduction to practice requirement is necessary to protect the taxpayer since few ideas ever reach the patent stage, and of those that do, only few achieve market acceptance which is the only true measure of their value.

We recognize that the formulation appearing in the proposed regulation appears in the Conference Report for the FY 1987 Defense Authorization Act, P.L. 99-500. See "National Defense Authorization Act for Fiscal Year 1987: Conference Report to Accompany S.2638", H. REP 99-1001, 99th Cong. 2d. Sess at 511 (1986). However, the formulation set forth in the Conference Report cannot be said to evidence Congressional intent for several reasons.

First, Public Law 99-500 contained no new provisions concerning the definition of "developed". The requirement to define "developed" came from Public Law 98-525 which was enacted to increase competition rather than increase contractor rights in data;

Second, the gratuitous language appearing in the Conference Report can hardly be said to reflect Congressional intent since the technical data provisions in Public Law 99-500 were enacted without the benefit of public hearings;

Finally, the language in the Conference Report is taken from the decision of the Armed Services Board of Contract Appeals in Bell Helicopter Textron, ASBCA No. 21192, 85-3 BCA 18,415 (1985). The language is what is known as dictum since it was not necessary for the Board's decision. Dictum is not binding legal precedent.

If the definition in the interim regulation is retained, the language "there is a high probability" should be deleted from the definition. As is, the definition defies logic. An item, component or process is "workable" if it is shown that it in fact works -- not that there is a "high probability" that it will work.

III. Other Matters

We would like to briefly suggest some additional initiatives to enhance competition.

A. Modify DFARS Supplement No. 6 to Provide for Generic Qualification of Spare Parts Manufacturers

Under current procedures for qualifying sources to manufacture critical parts a contractor generally must have made a part before in order to be approved as a source. This requirement often limits "competition" to subcontractors which have made a part for a prime contractor.

Only DoD procures in this manner which is akin to limiting a contract for a painting of a particular mountain to only artists which have painted a picture of such mountain in the past. DoD should, as in the private sector, qualify new sources on a generic as opposed to a part by part basis.

B. Require the Use of Commercial Source Approval Standards

The standard for commercial use of spare parts is FAA Parts Manufacturing Approval (FAA/PMA approval). FAA/PMA approval is based on identity with the part manufactured by the Original Equipment Manufacturer. FAA/PMA parts have proven to be safe and reliable in operation. See, PART MANUFACTURERS APPROVAL PROGRAM EVALUATION: Phase I Report, Prepared for U.S. Department of Transportation by COMSIS (December 1984).

Despite the fact that a vendor has extensive commercial and foreign military sales and FAA/PMA approval DoD often refuses to buy from them. The purported reason is that the part in question does not meet the DoD's engineering source approval standards which for the most part are nonexistent.

There is no reason to require more than FAA/PMA approval. Requiring the acceptance of FAA/PMA parts would materially increase competition and is consistent with recent rules requiring the acceptance of commercial products.

C. Eliminate the Presumption of CBD Synopsis for DoD Procurements

In enacting Public Laws 98-72 and 98-369, Congress required that a solicitation not be issued until 15 days after synopsis in the Commerce Business Daily and that a solicitation remain open for at least 30 days. This legislation was necessary in order to assure that small businesses obtain bid sets in time to bid. Congress undoubtedly meant actual synopsis as opposed to presumed synopsis.

However, FAR 5.203 permits a contracting officer to presume a requirement is synopsisized ten days after it is transmitted to the Department of Commerce. This provision has been found to be contrary to law by GAO. AUL Instruments, Inc., 64 Comp. Gen. 871, 85-2 CPD 324 (1985).

Despite the GAO ruling this provision continues to result in requirements not being synopsisized or synopsisized too late. Rather than follow the GAO decision and Congressional mandate, rulemakers sanctioned business as usual by revising the regulation to state that the presumption of synopsis was inapplicable if a contracting officer had evidence that a requirement was not synopsisized.

This approach defies logic. Contracting officers claim they do not have time to see that a synopsis has been published in a timely fashion. Therefore the only way they can obtain such information is from a potential source. However if a synopsis is not published a potential source won't see it and cannot tell the contracting officer it was never published.

The DAR Council should urge the FAR Council to repeal this provision while promulgating a DoD rule that complies with Public Laws 98-72 and 98-369.

D. Improve Information Provided in Commerce Business Daily Synopsis

DoD repeatedly complains that they are forced to send out too many bid sets and therefore need to charge for bid sets. At the same time our members tell us that because of inadequate CBD synopsis they are forced to request bid sets for items they ultimately determine they are not interested in. The obvious best solution for all concerned is to improve CBD synopsis to enable firms to be more selective in the bid sets they request. We would be happy to work with you on this.

E. Permit Bid Sets to Be Requested by Telephone

DoD often does not get bid sets to would be bidders in time to bid. Part of this delay is caused by contracting officers requiring a written request for a solicitation. DoD regulations should be modified to allow requests to be made by telephone.


F. Require Technical Data to Be Included in all Solicitations

Delays and problems in responding to solicitation occur because Government-owned technical data is not included in bid sets for spare parts contracts. This frustrates competition because it often takes six months to get technical data from DoD data repositories. The obvious solution is to require by regulation that bid sets contain Government-owned technical data.

CONCLUSION

NTMA very much appreciates the opportunity to submit these comments. If you have any questions, or if we can be of further assistance, please let us know.

Sincerely,


Matthew B. Coffey
President

Case Management Record

87-503
EXOC. SEC.
5/19/88

DAR Case No. 87-303		CAAC No.		Original Updated	Date 5/19/88
Title <i>Technical Data</i>					
Reference					
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Priority	Submitted By	Originator Code		Case Manager	
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Recommendation					
Notes					



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May 16, 1988

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Subject: DAR Case 87-303

Dear Mr. Lloyd:

Not long ago, Mr. Summerhour and John Lawther from EDS Corporation discussed at length one of the problems which industry is having with Technical Rights in Data. Mr. Summerhour suggested that we submit comments to you with the understanding that Mr. Summerhour and his committee would review said comments and perhaps address them in a future DFAR or FAR.

DFAR Subparts 227.472-3 (a) (iv), and 252,227-7013 (b) (iv) and FAR 52.227-7013 (b) (iv) are causing substantial problems with many of our vendors. EDS, as an integrator, works with many companies in order to come up with the best solution at the lowest overall cost in responding to RFPs. The above mentioned clauses create a great deal of concern as they require unlimited rights for "Manuals or instructional materials...prepared or required to be delivered under this or any other contract or any subcontract hereunder necessary for installation, operation, maintenance, or training purposes."

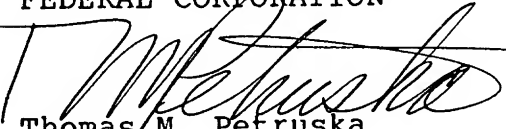
Even if this technical data is copyrighted, the contractor has to grant to the Government is nonexclusive, paid-up license throughout the world to use, copy, and distribute the material as authorized by the clauses.

Many vendors spend a great deal of money on this technical data which the Government has said must be provided with unlimited rights. In many instances, this data means a significant amount of revenue to the vendors. In fact, in some cases, e.g. training, it can mean the total revenue for a particular company and the vendor must be able to protect the competitive edge provided by its products. In any event, vendors generally refuse to give unlimited rights to this type of data. Their position is that this technical data is copyrighted and normal copyright laws should apply. In addition, almost all vendors take the position that granting to the Government a nonexclusive, paidup license throughout the world does great harm to their companies. For example, it can't be priced in many instances. Take for an example an agency who has solicitation for one (or more) computer systems. The prices for a Government paidup license could be more costly then the computer system(s).

Vendors have strongly suggested that if the Government require this type of copyrighted technical data, the Government should order such data from the vendor at the price listed in their catalog. All of the technical data in issue has been developed at private expense and would be a catalog offering with prices which are sold generally in the commercial marketplace.

EDS' position is that the Government should adopt the vendors suggestion as it would, among other things, eliminate a strong barrier for contractors to make such Non-Development Items (NDI)/Commercial technical data available to the Government.

Very truly yours,
ELECTRONIC DATA SYSTEMS
FEDERAL CORPORATION



Thomas M. Petruska
Manager
Policy and Reviews

TMP:srk

cc: John Lawther
Rick Summerhour

Case Management Record

DAR Case No. 87-303	CAAC No.	Original Updated	<input checked="" type="checkbox"/>	Date 20 June '88
Title Technical Data				
Reference				
Synopsis Additional Public Comments				
Priority	Submitted By	Originator Code	Case Manager	
Keywords				
Case References				
FAR Cites				
DFARS Cites				
Cognizant Committees				
Recommendation				
Notes				



THE OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-8000

PRODUCTION AND
LOGISTICS

P/CPA

87-303

Mr. Earl T. Steiner
8165 Woodlawn Drive
Piqua, Ohio 45356

Dear Mr. Steiner:

This is in reply to your recent letter to the Assistant Secretary of Defense (Production and Logistics) concerning Department of Defense (DoD) policy for the acquisition of data. The Defense Acquisition Regulatory (DAR) Council is now considering public comments on proposed changes to the DoD regulations concerning acquisition of technical data. I have provided the Director of the DAR Council with a copy of your letter.

We appreciate your interest in this matter.

Sincerely,

Alfred G. Volkman

Alfred G. Volkman
Director, Contract
Policy and Administration

8165 Woodlawn Dr.
Piqua, Ohio 45356
4 June 1988

Hon. Jack Katzen
Under Sec. of Defense
Production & Logistics
Pentagon
Washington, DC 20301

Dear Mr. Katzen,

I am sending you the enclosed as any citizen has a right. I am doing it out of utter frustration. I have worked in contracting for 22 years and I have always tried to follow the rules and regulations. It is impossible to follow those for the acquisition of data and particularly software.

I wrote the enclosed article to try to relieve myself of some of the frustration.

Sincerely yours,
Earl T. Steiner.

AQ000206788

The Dilemma of a Department of Defense Data Buyer

Pity the poor buyer in the Department of Defense (DOD) when he is to acquire data. With seven exceptions, he can not acquire this data and fully comply with the guidance in the Federal Acquisition Regulation (FAR) as supplemented. Even worse, if the data to be acquired is software specifically developed for the Government, he finds that there is a conflict between these regulations and public law.

Data, as defined in the FAR and its supplements, means recorded information regardless of form or method of recording. Technical data means recorded information, regardless of the form or method of recording, of a scientific or technical nature (including computer software documentation). Such term does not include computer software or data incidental to contract administration, such as financial and/or management information. Thus technical data is defined; it is assumed that all other data is non-technical data. There is a problem here that was brought about by Public Law 98-94. This public law added to 10 USC 140c the following paragraph (b)(2): "In this section, 'technical data with military or space application' means any blueprints, drawings, plans, instructions, computer software and documentation, or other technical information that can be used, or be adapted for use, to design, engineer, produce, manufacture, operate, repair, overhaul, or reproduce any military or space equipment or technology concerning such equipment." The normal assumption is that public law supercedes any Government regulation, but so far DOD has not recognized this by a change to its supplement to the FAR.

Most of the guidance the DOD buyer must follow is found in the DOD FAR Supplement (DFARS). Normally when data delivery is required under a contract it must be listed on a DD Form 1423, Contract Data Requirements List. There are seven exceptions to this requirement and they are set forth in DFARS paragraph 27.475-1. It is only when one of these exceptions apply that the buyer can fully comply with the regulatory and legal guidance. When none of the seven exceptions apply and data is required, the contracting officer must insert the DFARS clause number 52.227-7031, Data Requirements, in the contract. This clause states that the contractor is required to deliver only the data items listed on the DD Form 1423 and the data items identified in and deliverable under any other clause in FAR and DFARS made a part of the contract. The requirement for delivery of any data items under the contract can be established only by listing the data items on the DD Form 1423.

The problem to the DOD buyer comes when he tries to translate the DFARS guidance into the requirements of a contract. DFARS paragraph 15.406-2 states that when a DD Form 1423 is used to list technical data which is to be delivered under the contract, and none of the seven exceptions apply, the DD Form 1423 shall be designated as an exhibit and established as such in accordance with DFARS Section 4.7105. That seems plain and apparently it does not apply to non-technical data. The pertinent parts of this section state:

- (1) "'Exhibit' means a document attached to a procurement instrument, referenced by its capital letter identifier in a line or subline item in the procurement instrument Schedule, which establishes deliverable requirements".
- (2) "Each exhibit shall apply to one contract line or subline item".

(3) "The term 'Exhibit' shall not be used to identify any other attachment to a procurement instrument. When contract line items or subline items refer to a document attached to a procurement instrument which establishes a deliverable requirement, such spare parts or data on a DD Form 1423, this document shall be termed an Exhibit. When other types of documentation are appended to or incorporated by reference in a procurement instrument, such documentation shall be referred to as an 'Attachment' or other term identifying it as appended documentation. Such documentation may be attached to a contract exhibit provided such documentation does not identify a deliverable requirement which is not established by a contract or exhibit line or subline item."

(4) "DD Form 1423 --- may be used as an exhibit or as an attachment." If the DD Form 1423 is used as an attachment "a separate contract line item or subline item shall be established in the schedule for, and which references, each deliverable sequence number on the DD Form 1423".

(5) "Contract line or subline items in the schedule which reference an exhibit shall not contain unit prices or total amounts, except when necessary to reflect the amount of funds for actual or estimated requirements to satisfy the management needs of the individual procuring activity. When unit prices or total amounts are shown to satisfy a management need, such prices or amounts shall be set forth in parentheses within the item description block of the contractual document (i.e., not within the unit price or amount columns)".

In short what has been established so far is that, if technical data is being acquired it must be on a DD Form 1423, and that form is to be designated an exhibit in accordance with Section 4.7105 in DFARS. This exhibit must be identified by an alpha character and referenced in only one line or subline item. The DFARS clause "Data Requirements" says that the only way the contractor can be required to deliver data is by putting the data on a DD Form 1423. DFARS Section 4.7105 states that whenever a delivery requirement is established for data on a DD Form 1423 it shall be termed an exhibit. The Section also states that the DD Form 1423 may be used as an attachment. Why would data be listed in the contract if it is not deliverable? Why would DOD pay for data that wasn't to be delivered? The word deliverable is a little misleading; it actually refers to data that is an end item of the contract. Non-technical data is not usually an end item of the contract. We do not write a contract for the purpose of receiving such information as administrative data, reports of maintenance action, minutes of meetings, or the funds expended at different stages of contract completion. When a DD Form 1423 is used as an attachment, the price of the data is set forth in a line or subline item that references a sequence number on the DD Form 1423. If it is technical data or deliverable non-technical data (i.e. an end item of the contract), the DD Form 1423 must be designated an exhibit and treated as such.

It is all so simple with technical data. It is listed on a DD Form 1423 and the DD Form 1423 is an exhibit attached to a line or subline item that does not contain prices. The prices are in the exhibit, but where on a DD Form 1423 is there a place for prices? A simple solution is to ignore all the above and follow the guidance in DFARS Section 15.871. This states that "the solicitation shall include priced line item for that data". It is impossible to comply with both DFARS Section 15.871 (do not put prices in the exhibit, but reference the exhibit in a priced line item) and DFARS Section 4.7105 (the line item referencing the exhibit does not contain prices but the exhibit does) at the same time.

AFFARS 15.871 adds some other complications to acquiring data. It contains the ground rules for determining when it is not practical to separately price data, and that the cost of the data is included in some other line item. DOD has consistently sought to identify the cost of data to see if the benefits derived from the data are worth the cost. The easiest time to require that the contractor separately price data is during competition, but that is one of the excuses for not doing it. When the instructions on the back of the DD Form 1423 are followed, there is a good basis to decide if the cost of the data is basically an indirect or direct cost to the contract. This should be the deciding factor. The DD Form 1423 requires the contractor to group the data in four different categories.

(1) Group I data "is not otherwise essential to the contractor's performance --- but which is required" by the the DD Form 1423.

(2) Group II data "is essential to the performance of the primary contracted effort but the contractor is required to perform additional work to conform to the Government requirements".

(3) Group III data is "data which the contractor must develop for his internal use in performance of the primary contracted effort and does not require substantial change to conform to Government requirements".

(4) Group IV data "is developed by the contractor as part of the normal operating procedure and the effort in supplying these data to the Government is minimal".

The cost of data to be separately priced in the contract is the cost of producing and delivering the data above and beyond the cost of otherwise performing the contract. The definitions as presented above are not complete, but they serve to demonstrate that only Group IV data should routinely be not separately priced; Group I data should almost always be separately priced; and in Groups II and III the additional effort should be separately priced. All too often contracting officers find this effort too much trouble. This happens even when the contractor clearly defines in his proposal the cost of the data.

Software specifically prepared for delivery to the Government does not really fit any of the above four categories. The guidance established for buying data assumes that the data was developed in conjunction with the development of some system, such as an airplane or radio. Under this assumption, the purpose of the contract is not the delivery of data as such, but the delivery of a system and its supporting data. The airplane will be usable even without the data. There is no guidance for the acquisition of data when the purpose of the contract is the delivery of that data. The purpose of the contract cannot be fulfilled without the delivery of that data. This definition fits software when it is an end item of the contract. The guidance cannot be bent to fit the situation. The law says that the software is technical data, but both FAR and DFARS says it is not technical data. How is it to appear in the contract? If it is technical data it must be on a DD Form 1423 treated as an exhibit. It must be priced in the exhibit not in a priced line or subline item. If it is not technical data but deliverable data, it still must be on a DD Form 1423. The problem, besides having no place on the DD Form 1423 for prices, is that DOD does not have a Data Item Description (DID) for the delivery of the software itself. Data to be delivered must be on a DD Form 1423, and to do this requires a DID for that data. When MIL-STD-2167 covering development of software came out, the DIDs referenced in it cover all of the the data supporting the development and use of the software,

but no DID covering the delivery of the actual software itself. Why would DOD pay to have software developed, have all the supporting documentation delivered, and then not require the delivery of the software?

The DOD data buyer needs help. He needs to be included in the committee set up to clarify the acquisition of data. That buyer should be one who knows the technical aspects of contracting. Software needs to be recognized as a deliverable end item of the contract. The guidance as a minimum should allow software as a priced line or subline item in the contract, a DID should be established for software, and it should be on a DD Form 1423 used as an attachment.

Earl T. Steiner

MR. EARL T. STEINER
8165 WOODLAWN DRIVE
PIQUA, OHIO 45356

513-773-2357

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(End of clause)

252.227-7028 Requirement for technical data certification.

As prescribed at 227.473-4(a), insert the following provision:

Requirement for Technical Data Certification (APR 1988)

The Offeror shall submit with its offer a certification as to whether the Offeror has delivered or is obligated to deliver to the Government under any contract or subcontract the same or substantially the same technical data with other than unlimited rights included in its offer; if so, the Offeror shall identify:

(a) One existing contract or subcontract under which the technical data were delivered or will be delivered, and the place of delivery; and

(b) The limitation on the Government's right to use the data, including identification of the earliest date the limitation expires.

(End of provision)

252.227-7029 Identification of technical data.

As prescribed at 227.473-3(a), insert the following clause:

Identification of Technical Data (MAR 1975)

Technical data delivered under this contract shall be marked with the number of this contract, name of Contractor, and name of any subcontractor who generated the data.

(End of clause)

252.227-7030 Technical data—withholding of payment.

As prescribed at 227.473-5(b), insert the following clause:

Technical Data—Withholding of Payment (APR 1988)

(a) If technical data specified to be delivered under this contract, is not delivered within the time specified by this contract or is deficient upon delivery (including having restrictive markings not specifically authorized by this contract), the Contracting Officer may until such data is accepted by the Government, withhold payment to the Contractor of ten percent (10%) of the total contract price or amount unless a lesser withholding is specified in the contract. Payments shall not be withheld nor any other action taken pursuant to this paragraph when the Contractor's failure to make timely delivery or to deliver such data without deficiencies arises out of causes beyond the control and without the fault or negligence of the Contractor.

(b) After payments total ninety percent (90%) of the total contract price or amount and if all technical data specified to be

accruing to the Government under this contract.

(End of clause)

252.227-7031 Data requirements.

As prescribed at 227.475-1, insert the following clause:

Data Requirements (APR 1988)

The Contractor is required to deliver the data items listed on the DD Form 1423 (Contract Data Requirements List) and data items identified in and deliverable under any contract clause of FAR Subpart 52.2 and DoD FAR Supplement Subpart 252.2 made a part of the contract.

(End of clause)

252.227-7032 Rights in technical data and computer software (Foreign).

As prescribed in 227.475-5, insert the following clause:

Rights in Technical Data and Computer Software (Foreign) (JUN 1975)

The United States Government may duplicate, use, and disclose in any manner for any purposes whatsoever, including delivery to other governments for the furtherance of mutual defense of the United States Government and other governments, all technical data including reports, drawings and blueprints, and all computer software, specified to be delivered by the Contractor to the United States Government under this contract.

(End of clause)

252.227-7033 Rights in shop drawings.

As prescribed at 227.478-2(a)(2), insert the following clause:

Rights in Shop Drawings (APR 1966)

(a) Shop drawings for construction means drawings, submitted to the Government by the Construction Contractor, subcontractor or any lower-tier subcontractor pursuant to a construction contract, showing in detail (i) the proposed fabrication and assembly of structural elements and (ii) the installation (i.e., form, fit, and attachment details) of materials or equipment. The Government may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

(b) This clause, including this paragraph (b), shall be included in all subcontracts hereunder at any tier.

(End of clause)

252.227-7034 Patents—subcontracts.

As prescribed at 227.304-4, insert the following clause:

Patents—Subcontracts (APR 1984)

Materials Safety Data Sheet (MSDS) required by the clause at FAR 52.223-3.

(b) The clause at 252.227-7031, Data Requirements, states that the contractor is required to deliver only data listed on the DD Form 1423 and data deliverable under clauses prescribed in the FAR and DFARS.

227.475-2 Deferred delivery and deferred ordering.

(a) *General.* Technical data and computer software is expensive to prepare, maintain and update. By delaying the delivery of technical data or software until needed, storage requirements are reduced and the probability of using obsolete technical data and computer software is decreased. Purchase of technical data and computer software which may become obsolete because of hardware changes is also minimized.

(b) *Deferred delivery.* When the contract requires delivery of technical data or computer software, but does not contain a time for delivery, the clause at 252.227-7026 "Deferred Delivery of Technical Data and Computer Software", shall be included in the contract. The clause permits the contracting officer to require the delivery of data identified as "deferred delivery" data at any time until two years after acceptance by the Government of all items (other than data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors to deliver such technical data expires two years after the date the prime contractor accepts the last item from the subcontractor for use in the performance of the contract. The contract must specify which technical data or computer software will be subject to deferred delivery. The contracting officer should provide sufficient notice to permit timely delivery of the technical data or computer software.

(c) *Deferred ordering.* When a potential need exists for technical data or computer software, but a firm requirement is not established, the clause at 252.227-7027, "Deferred Ordering of Technical Data or Computer Software", should be included in the contract. Under this clause, the

termination, whichever is later. The obligation of subcontractors to deliver such technical data or computer software expires three years after the date the contractor accepts the last item under the subcontract. When the data and computer software is ordered, the delivery dates shall be negotiated and the contractor compensated for converting the technical data or computer software into the prescribed form. Compensation to the contractor shall not include the cost of technical data or computer software which the Government has already paid for.

227.475-3 Warranties of technical data.

The factors contained in Subpart 246.7, Warranties, shall be considered in deciding whether to include warranties of technical data. The basic technical data warranty clause is set forth in the clause at 252.246-7001. There are two alternates to the basic clause. The basic clause and appropriate alternate should be selected in accordance with section 246.708.

227.475-4 Delivery of technical data to foreign governments.

When the Government proposes to make technical data subject to limited rights available for use by a foreign government, it will, to the maximum extent practicable, give reasonable notice to the contractor or subcontractor asserting rights in the technical data. Any release shall be subject to a prohibition against further release, use or disclosure.

227.475-5 Overseas contracts with foreign sources.

The clause at 252.227-7032, Rights in Technical Data and Computer Software (Foreign), should be used in solicitations and contracts with foreign sources when the Government will acquire unlimited rights in all deliverable technical data, and computer software. However, the clause shall not be used in contracts for special works (see section 227.476), contracts for existing works (see section 227.477), or contracts for Canadian purchases (see Subpart 225.71, Canadian Purchases). However, the clause at

227.475-6 [Reserved]

227.475-7 [Reserved]

227.475-8 Publication

Alternate I of the clause at 252.7013, Rights in Technical Data and Computer Software, research contracts where the contracting officer determines, in consultation with legal counsel, that publication of the work by the contractor:

(a) Would be in the interest of the Government;

(b) Would be facilitated by the Government relinquishing its rights to publish the work for others to publish the work on behalf of the Government.

227.476 Special works.

(a) The clause at 252.476-7001, Special Works, shall be included in all contracts where the Government needs ownership or control of the work to be generated. Examples include:

(1) Production of motion pictures, including motion pictures;

(2) Television recordings, without accompanying scripts;

(3) Preparation of scripts, musical compositions, tracks, translations, and the like;

(4) Histories of the Department for sale thereof;

(5) Works pertaining to morale, training, or

(6) Works pertaining to guidance of Government employees in the performance of official duties; and

(7) Production of studies.

(b) Contracts for special works may include limitations with music licenses and the like which are purpose for which acquired.

227.477 Contracts for existing works.

(a) *Acquisition.* The clause at 252.477-7001, Existing Works, shall be included in all contracts for the acquisition of existing motion

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MAPI

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May 27, 1988

Mr. Charles W. Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
Room 3D139
The Pentagon
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

Interim Defense Department Regulations Relating To
Rights in Technical Data

DAR Case 87-303

We wish to comment on the interim regulations published in the Federal Register of April 1, 1988, that amend provisions of the Defense Federal Acquisition Regulation Supplement (DFARS) relating to rights in technical data under defense contracts.

According to the preamble statement to the rules, the interim regulations are intended to implement revisions required by Section 808 of the Fiscal Years 1988 and 1989 Department of Defense (DOD) Authorization Act (P.L. 100-180). Additionally, the preamble further states that, in drafting these rules, consideration was specifically given to Executive Order 12591, entitled "Facilitating Access to Science and Technology," issued on April 10, 1987, and to certain issues raised by public comments that were not adequately addressed during formulation of previous rules in this area. Our further understanding is that the interim rules are now in effect and supersede all prior regulations relating to rights in technical data for defense contracts resulting from solicitations issued on or after April 2, 1988.

For reasons more fully detailed below, we urge DOD to carefully review again these interim regulations with a view toward refining and redrafting them to reflect a policy that is more, not less, consistent with the position taken by the Administration and Congress in this very important area of rights in technical data. In particular, the regulations should demonstrate a more substantial effort to properly balance the interests of the government and the contractor.

MAPI promotes the technological and economic progress of the United States through studies and seminars on changing economic, legal, and regulatory conditions affecting industry.

MAPI's Interest

Before we address our comments specifically to the regulations, a brief description of our organization may be helpful. MAPI is a policy research institute whose 500 member companies are drawn from a wide range of U.S. industries. Our membership is comprised of leading companies and trade organizations, including ones engaged in heavy industry, aerospace, electronics, precision instruments, telecommunications, chemicals, computers, and similar high-technology industries. The Institute conducts original research in economics, law, and management and provides professional analyses of issues critical to the economic performance of the private sector. The Institute also acts as a national spokesman for its member companies, concerning itself with policies that stimulate technological advancement and economic growth for the benefit of U.S. industry and the public interest.

Although most of our member companies in these industries are predominantly oriented toward the commercial market, a significant number have substantial defense sales at the prime and/or subcontract level and their continuing participation in such business is vital to the maintenance of a strong national defense industrial base. Virtually all of our member companies are engaged in development of innovative technology to maintain economic viability in the competitive U.S. and world markets and, therefore, attach paramount importance to issues concerning protection of technical data rights in both the commercial and government sectors. Thus, DOD's interim regulations are of direct and significant concern to our member companies that have existing defense business or are contemplating defense business as a future market.

Specific Comments

Specific Guidance Is Needed To Establish When Negotiations Are Impracticable

Regarding data relating to an item developed with mixed contractor-government funds (mixed funding), Congress specified through last year's legislative amendments that rights in technical data ". . . shall be based upon negotiations between the United States and the contractor, except in any case in which the Secretary of Defense determines, on the basis of criteria established in the regulations, that negotiations would not be practicable."/1 (Emphasis added.)

The criteria set forth in the interim regulations, under Subpart 227.473-1(d), merely provide that the contracting officer may determine that negotiations are impracticable ". . . when there are numerous offerors or when an award must be made under urgent circumstances . . . ," and that

1/ National Defense Authorization Act for Fiscal Years 1988 and 1989, P.L. 100-180, Sec. 808(a)(2)(B).

the determination must be approved by the chief of the contracting office. An initial question is raised as to whether, under the statute, the determination not to negotiate is properly delegated under this regulation.

Of greater concern is the apparent lack of sufficiently precise criteria in the regulations to establish when negotiations are not practicable. We refer to Senator Dixon's remarks on the Senate floor last year reflecting the congressional intent on this issue:

. . . [T]he conferees have recognized that there may be exceptional circumstances when negotiations, particularly in advance of contract, are not feasible. In those limited circumstances, clearly identified and detailed in the regulations, an alternative procedure may have to be established. . . .²

Senator Dixon further commented that these types of instances were expected to be "rare."

At the very least, there must be further clarification as to the basis for "numerous offerors." Additionally, what constitutes "urgent circumstances" under which an award must be based? On this latter point, there is tremendous potential for abuse by a contracting activity to unnecessarily delay contract award in every instance until it becomes "urgent" in order to avoid this negotiation process. Contractors are afforded no protection under these regulations for this type of abuse and may very well be forced to provide proprietary data simply to remain eligible for defense business.

While the regulations appear to implement the statutory guidance on this issue, they can be characterized as merely giving lip-service to the statute, with no actual reflection of congressional intent. The potential for abuse by the contracting activity in refusing to conduct negotiations in mixed funding cases is significant. We recommend that more precise guidance be included, as expressed by Congress, to establish realistic and "rare" circumstances under which negotiations for rights in technical data may be impracticable.

Government Purpose License Rights (GPLR)

Access to others.--We note that under Section 227.472-3(a)(2), DOD has retained an earlier concept developed in previous regulations in which DOD may acquire proprietary technical data subject to Government Purpose License Rights (GPLR). The regulation further provides that, under these circumstances, not only shall the government retain a royalty-free right to use, duplicate, and disclose data for government purposes only, but also the government "may permit others to do so for Government purposes only. . . ."

^{2/} Congressional Record, Nov. 19, 1987, at S.16489.

While we do not object to the general concept of GPLR, the latter provision in the regulations which allows the government to permit unspecified "others" access to this proprietary data affords the contractor which owns the data no protection or control over its proprietary material. It is quite conceivable that this provision will enable competitors to gain important access to this data for commercial purposes when such access was otherwise not possible. Because of this significant potential for abuse, it would hardly be advisable for any contractor that wishes to protect certain of its proprietary data to accept a GPLR under the regulations, as drafted. We recommend that the phrase allowing the government to permit others access to data acquired with GPLR privileges be deleted or, in the alternative, that specific restrictions be incorporated into the regulations to afford more protection for the contractor that owns the data.

Proposed alternative approach by DAR Council.--Responding to the DAR Council's request for comments concerning an alternative approach to the use of nondisclosure agreements where data subject to GPLR are involved, in brief, we do not support the proposed alternative. Our conclusion is based upon our initial understanding that this proposal contemplates, through a solicitation provision, notifying prospective offerors that data subject to GPLR is included and that offerors would receive this technical data for purposes of preparing their individual offers subject to restrictions on further use or disclosure and subject to a requirement to safeguard the data.

We can see no real protections afforded to the owner of the proprietary data under this contemplated proposal and recommend strongly against its implementation. This can only serve as a major disincentive to companies to engage in defense business. This is particularly the case for small businesses, whose economic survival depends upon the development and production of one or even a few unique items. The risk is high that a prospective commercial competitor will participate as an offeror in a government competition, acquire the proprietary data, and use it to its commercial competitive advantage. It is unrealistic to assume that the small business owner of the proprietary data can afford to take this kind of risk. As a practical, economic matter, any legally enforceable remedies provided through a nondisclosure agreement are, for small businesses, "too little, too late," in this context. They will be driven out of business or choose not to engage in further business with DOD.

Although perhaps not as critical in terms of economic survival, these same risks noted above apply to major defense contractors. Without significant protection of their proprietary data in this context, which cannot be envisioned at this point, the proposal under consideration by the DAR Council is equally inhibitive to such contractors. It can only be seen as a disincentive to engage in further business with DOD, from any contractor's standpoint, to allow virtually unrestricted disclosure in the offerors' arena through use of GPLR.

We recommend that the GPLR-to-prospective-offerors proposal under consideration by the DAR Council be withdrawn.

Direct Licensing

We note that express statutory guidance was provided by Congress to DOD in recent legislative amendments to permit, as an alternative to negotiating limited rights to the government, a contractor or subcontractor to license directly to third parties the use of proprietary technical data which the contractor is otherwise allowed to restrict, if it is in the government's interests to develop alternative sources of supply and manufacture./3

Senator Dixon, the sponsor of the most recent statutory revisions on this subject, commented as follows on what he had in mind:

. . . . While I recognize that direct licensing has its limitations for the Government, it should be a recognized and acceptable alternative for use to fulfill the Government's needs. Even when coupled with a proper nondisclosure agreement, using the Government as a conduit for exchanging sensitive limited rights data has its pitfalls. . . . /4

It is with substantial concern we note that the interim regulations ignore this statutory guidance completely and fail to refer at all to the availability of direct licensing. The advantages of direct licensing to a contractor far outweigh any perceived disadvantages to DOD in this area. Not only would this method permit DOD to meet its need to disclose contractor technical data outside the government to promote competition or second-sourcing, as examples, it effectively implements DOD's stated policy under Section 227.472-2 of the regulations that DOD ". . . will use the least intrusive procedures in order to protect the contractor's economic interests. . . ." Moreover, application of direct licensing allows the contractor to undertake a direct burden in controlling and enforcing its interests in its proprietary technical data, relieving the government of a similar burden under any alternative sublicensing agreements.

We strongly recommend that immediate consideration be given to including provisions emphasizing the desirability of contractor direct licensing as an alternative to government acquisition of GPLR privileges or limited rights in technical data.

Overview of the Regulations

While we recognize that DOD has been operating under very limited congressionally mandated time constraints in formulating these interim regulations, we feel compelled to observe with significant concern that the regulations overall reflect many inconsistencies, both internally in context and externally in terms of policy. These inconsistencies should

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- 3/ National Defense Authorization Act for Fiscal Years 1988 and 1989, P.L. 100-180, Sec. 808(a)(4)(C).
4/ Congressional Record, Nov. 19, 1987, at S.16489.

not be ignored and justify a suspension of the application of the regulations for a more careful review within DOD.

Although it is stated that consideration was given to Executive Order 12591, "Facilitating Access to Science and Technology," there is a genuine concern raised by the content of the regulations as to the level of DOD's commitment to the Administration's policy expressed in this Order. That is, that all federal agencies, including DOD, shall adopt a policy that permits contractors to retain, not release, their rights in technical data and software in exchange for royalty-free use by or on behalf of the government. It follows that for this policy to be effective, adequate protection to the contractor against disclosure of the government's limited use rights to competitors is absolutely essential. Direct licensing by contractors to third parties is one alternative method of protection that is completely consistent with the Executive Order policy but, as we noted earlier, appears to have been ignored in these regulations.

Moreover, and as we outlined more specifically above, Congress has indicated its policy and intent in this area. The question is raised again, after identifying some significant inconsistencies between the regulations and statutory guidance, as to the level of DOD's commitment to implement congressional policy in this instance.

On a broader scale, these regulations appear to continue to reflect a disturbing unwillingness by DOD to recognize the substantial economic needs of industry to sufficiently protect legitimate proprietary interests in its technical data. This is essential for U.S. domestic and international competitiveness. As currently drafted, the regulations reflect an undue bias toward the government in obtaining virtually unrestricted rights in proprietary technical data developed from private or mixed funds investment, with very little protection against disclosure in the competitive marketplace afforded the contractor that generates the unique technology associated with the data.

There is a very real and harsh economic risk to the contractor in doing business with DOD under the current regulatory guidance. Unless adequate technical data protections are provided to contractors who engage in defense business, the disincentives for further defense business will increase. Certainly, at the very least, innovations in defense technology, as compared to commercial technology, will decrease.

* * *

This concludes our comments on the interim technical data regulations. If we can be of further assistance, please let us know.

Sincerely,

Ken McJannet
P r e s i d e n t

cc: The Honorable Jack Katzen
Assistant Secretary of Defense
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June 2, 1988

Defense Acquisition Regulatory Council
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ODASD(P)DARS
c/o OASD(P&L)(MRS), Room 3D139
The Pentagon
Washington, D.C. 20301-3062

Re: DAR Case 87-303

Dear Mr. Lloyd:

Enclosed is a draft of a paper Michael Greenberger and I prepared for the Computer Law Association. I would like to submit it as a comment to the interim data rights regulations which appeared at 53 Fed. Reg. 10,780 (1988) as changes to Subpart 227.4 and Part 252 of the Defense Federal Acquisition Regulation Supplement. I hope you find it useful.

Sincerely yours,


Michael S. Kane

MSK:srh
Encl.

RIGHTS-IN-DATA POLICIES AFFECTING
DEPARTMENT OF DEFENSE ACQUISITION
OF COMPUTER SOFTWARE AND RELATED PRODUCTS

By

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April, 1988

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This paper has been prepared to give the reader a general understanding of the very complex subject of the Federal Government's "rights-in-data" policies, especially insofar as those policies affect the Government's acquisition of computer software. This paper is not intended to render legal or other professional advice or assistance.

RIGHTS-IN-DATA POLICIES AFFECTING DEPARTMENT OF DEFENSE
ACQUISITION OF COMPUTER SOFTWARE AND RELATED PRODUCTS

by
I. Michael Greenberger
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I. PROTECTIONS FOR SOFTWARE IN THE
COMMERCIAL WORLD COMPARED TO DEPARTMENT
OF DEFENSE DATA RIGHTS REGULATIONS

Even outside the Governmental sphere, private software companies have had difficulty preventing their competitors from usurping valuable intellectual property. Because of great uncertainty within the law, patents and copyrights have not been viewed as reliable protections for proprietary software and related documentation. Instead, software developers have tended to protect proprietary information by resorting to the common law of trade secrets.^{1/}

The benefits of trade secrecy endure only so long as the trade secret owner takes all reasonable steps to maintain confidentiality.^{2/} Accordingly, dissemination of computer-related

^{1/} R. Milgram, Milgram on Trade Secrets § 2.06A[5][c] (1987); see generally R. Nimmer, The Law of Computer Technology ¶¶3.01-3.18 (1985).

^{2/} See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1002 (1984) ("If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished."); Motorola, Inc. v. Fairchild Camera & Instrument Corp., 366 F. Supp. 1173, 1186-1188 (D. Ariz. 1973); see generally M. Epstein, Modern Intellectual Property 6-25 (1986).

trade secrets is governed by contractual agreements, usually licenses or leases of specific intellectual property, that require the licensee or lessee to keep proprietary materials confidential and prohibit disclosure of these materials to third parties. These contractual protections can be molded to the needs of the specific commercial context, imparting a flexibility that gives developers increased control over the use and misuse of their software. Further, licensing permits developers to retain the software's commercial value because they may continue to market the software themselves. As a result, developers demand less compensation from the licensees.^{3/}

This system of protecting software through context-specific contractual arrangements has been thwarted by so-called "rights-in-data" clauses in defense contracts. These clauses generally allow the Department of Defense ("DoD") to freely take ownership in a private company's proprietary materials and to disseminate these materials broadly. Accordingly, private companies doing business with the DoD place their trade secrets in jeopardy and risk losing valuable commercial information to their competitors. As a result, these rights-in-data provisions have often been perceived as onerous and unfair.

^{3/} Greenberger, Shuba, Edmond and Strassfeld, Commercial Models for Legal Protection of Computer Software in Contracts with Government Agencies (Vol. II of the Software Engineering Institute Report, Seeking the Balance Between Government and Industry Interests in Software Acquisitions) 9 (SEI-87-MR-9 May 1987). [Hereinafter "Commercial Models"].

Criticisms of this nature were echoed by the President's Blue Ribbon Commission on Defense Management ("the Packard Commission") in its June 30, 1986 report. The Packard Commission asserted that the DoD policy governing data rights acquisitions did not establish the proper balance between the Government's need for technical data and the benefits to the nation that accrue from protecting the private sector's proprietary rights: "That balance must be struck so as to foster technological innovation and private investment which is so important in developing products vital to our defense."^{4/}

In order to appreciate more fully the basis of the Packard Commission's criticisms and the source of industry discontent, it is necessary to undertake a more detailed analysis of the DoD regulatory scheme which governed the acquisition of software rights in the middle of 1986. While the overall rights-in-data regulatory framework addresses DoD's intellectual property rights in both "computer software" and "technical data," the regulations define "computer software" as an entity distinct from "technical data."^{5/} Accordingly, the acquisition of

^{4/} President's Blue Ribbon Commission on Defense Management, A Quest for Excellence 64 (1986) (hereinafter "Packard Commission Report").

^{5/} "Computer software" is defined by the regulations to include (1) data bases: "a collection of data in a form capable of being processed and operated on by a computer;" and (2) computer programs: "a series of instructions or statements in a form acceptable to a computer, designed to cause the computer to execute an operation or operations." 48 C.F.R. 227.401 (1986). "Technical data" has been defined to mean "recorded information (Footnote Continued)

computer software is addressed in a separate section of the regulations. See 48 C.F.R. § 227.404-1 (1986). However, both sets of rules were in mid-1986 based on the same general regulatory model, e.g., "computer software" developed with Government funds and other "technical data" generated with public monies were extended virtually identical treatment. As discussed below, the same software rules in effect in 1986 essentially remain in effect today, whereas the rules generally governing technical data have been subject to two important revisions.^{6/}

II. DATA ACQUISITION POLICIES GOVERNING COMPUTER SOFTWARE

Government rights in software are typically set at one of two levels, "unlimited" or "restricted." "Unlimited rights," as that term suggests, permit DoD to "use, duplicate, or disclose . . . software in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so." 48 C.F.R. § 227.401 (1986). Accordingly, a contractor's proprietary interest in its software may be compromised whenever a DoD contract contains a clause providing that its product is subject

(regardless of the form or method of the recording) of a scientific or technical nature (including computer software documentation) relating to supplies procured by an agency." 10 U.S.C. § 2302(4); accord 48 C.F.R. § 227.401 (1986); see infra note 20 and accompanying text.

^{6/} The descriptions that follow of how DoD rights-in-data clauses work is by no means exhaustive, but rather deal with the general themes underlying government procurement policy. For a more detailed analysis of this complex and confusing subject, see, e.g., See Taylor & Burgett, Government Rights in Data & Software, Briefing Papers 88-3 (February 1988).

to DoD's unlimited rights. This risk is of special concern to businesses in the computer industry because their entire existence may depend upon preventing trade secrets from being disclosed to competition.^{7/}

Much of the harshness of the DoD's data rights and software acquisition policies flows from the fact that the government routinely jeopardizes the fruits of private investment by inappropriately demanding unlimited rights. DoD has generally taken the position that the government receives unlimited rights in software and other technological data if any government funds at all are used in their development.^{8/} Thus, DoD's rights-in-data provisions grant DoD unlimited rights in software that results "directly" from R&D work specified by a defense contract, even if the software itself was not a specified or necessary element of performance of that contract. 48 C.F.R. 227.404-1(a)(1) (1986).^{9/} In a cost sharing project, the Government takes unlimited rights to all data, software, and software documentation regardless of whether the contractor provided most of the development funds. Similarly, a contractor who completes

^{7/} Greenberger, Rights-in-Data Policies Affecting Government Acquisition of Computer Software and Related Products, July 1986, at 27 (unpublished report).

^{8/} See generally Taylor & Burgett, supra note 5 at 5-16.

^{9/} Software developed with independent research and development fund (IR&D) is treated as if it were developed with private funds. See Defense Procurement Circular No. 22, Jan. 29, 1965; see also 53 Fed. Reg. 10,781 (April 1, 1988). See Greenberger, supra note 6 at 8.

a privately funded project with public funds may lose all its proprietary rights except under limited circumstances. See supra note 9. If DoD is unable to specify what software it wants delivered with unlimited rights at the time of contracting, it may insert into the contract a deferred ordering clause, which allows it to demand the delivery of software even after the contract has been fully performed. See 48 C.F.R. §§ 227.410-1(c); 252.227-7027 (1986).

On the other hand, when software is developed wholly with private funds, a contractor is generally able to negotiate a grant of "restricted rights." The protections afforded such privately-developed software ostensibly approach the norms of the commercial world because the contractor is able -- at least in theory -- to incorporate its standard licensing agreement into the contract. 48 C.F.R. § 227.404-2(b)(3) (1986).^{10/} Nevertheless, these protections are often lost when contractors fail to comply with the regulations' bewildering procedural requirements. For example, the Government will take unlimited rights if the software is not delivered with the proper restrictive legend or if the license agreement is not specifically referenced by the contract. Id.; § 227.404 (d)(2).

^{10/} The Government always receives certain "minimum" rights in the software, such as the right to modify the software and the right to prepare backup copies. 48 C.F.R. 227.401 (1986).

Other features of the DoD regulations tend to further undermine proprietary rights in privately-developed software. Although negotiations allow the flexibility characteristic of the ordinary commercial setting, the regulations do not offer contracting officers the guidance necessary to limit their demands for Government rights. As a result, contracting officers may seek the maximum rights possible because they fear the criticism that will result from negotiating too few rights.^{11/} Developers of privately-developed "off-the-shelf" or "commercial" software may avoid negotiations by electing a definition of restricted rights prescribed by the regulations. 48 C.F.R. § 252.227-7013(b)(3)(ii) (1986).^{12/} This alternative, however, is not entirely satisfactory because the prescribed bundle of rights gives contractors, subcontractors and agents of DoD the right to use the software at a Government facility so long as they agree to be bound by the applicable restrictions. See Id. § 252.227-7013(b)(3)(ii)(C). The use of software by such a varied group of private parties creates the risk of widespread dissemination of proprietary software to competitors and potential competitors.

^{11/} See Taylor & Burgett, supra note 5 at 10.

^{12/} "Commercial computer software" is software that is "used regularly for other than Government purposes and is sold, licensed, or leased in significant quantities to the general public at established market or catalog prices." 48 C.F.R. § 227.401 (1986).

As they existed in 1986, the DoD regulations treated documentation for noncommercial software differently than documentation for commercial software, which could be made subject to the same restrictions as the software itself. 48 C.F.R. § 52.227-7013(b)(3)(ii) (1986). Specifically, instruction manuals explaining noncommercial software -- even software that would otherwise be subject to restricted rights -- were governed by unlimited rights and could be freely disseminated by DoD. Id. § 227.403-2(b)(5). To the extent that these manuals revealed proprietary information, the benefits derived from the application of restricted rights to the noncommercial software or to other documentation were lost, because the Government could transfer the manuals to whomever it chose, for any purpose whatsoever, including non-Governmental purposes. As a response to these onerous regulations, it is likely that those contractors who chose to do business with DoD included in their manuals only the bare minimum of information necessary to meet contract requirements.^{13/}

III. THE PACKARD COMMISSION REPORT

Software and software rights are conveyed daily in the private sector in situations reflecting needs and circumstances often no less varied -- or conflicting -- than those facing

^{13/} See Greenberger, supra note 6 at 7.

DoD. Yet the commercial world knows nothing of mechanisms like DoD's rights-in-data system. In its official report, the Packard Commission expressed concern over the detrimental effects of this system on the development of all new technology: "[W]e find in general that a policy of invariably acquiring unlimited rights whenever development has occurred at public expense removes incentive to commercialize. More importantly, we find that a policy of permitting contractors no rights in data developed with mixed funding creates even greater disincentives."^{14/}

Thus, the Packard Commission proposed a shift away from Governmental assertion of unlimited rights towards greater reliance on contract negotiations for the assignment of technical data rights. The report concluded that DoD should pattern its acquisition policies and practices more closely on the commercial - model:

"The inescapable conclusion is that it is time to adopt a new policy that is (1) clear and coherent, (2) no more divergent from commercial practices than is necessary for DoD to achieve its mission, (3) appropriate in terms of DoD's needs to use the technology, and (4) appropriate in terms of the intellectual property rights associated with software."^{15/}

The Packard Commission Report spurred efforts at reform in both

^{14/} Packard Commission Report, supra note 4, App. I, § III, at 120 (emphasis in original).

^{15/} Packard Commission Report, supra note 4, App. I, § V, at 124.

the Congress and the Executive Branch.

IV. DoD RESPONSES TO CONGRESSIONAL AND
EXECUTIVE BRANCH INITIATIVES

A. The Defense Acquisition Act of 1986. Four months after the Packard Commission Report, Congress enacted the Defense Acquisition Improvement Act of 1986.^{16/} The accompanying Conference Report specifically rejected the philosophy that has formed the basis for DoD rights-in-data policies:

"The Department of Defense should generally seek to acquire the same rights in data that a commercial customer would in acquiring the same product. For example, if a contractor were to purchase an item in the commercial sector, it would not receive unlimited rights to use, release or disclose technical data necessary to manufacture the item."^{17/}

While retaining the concept of unlimited Government rights in data developed exclusively with federal funds, Congress directed that rights in data developed with mixed funding should be negotiated. 10 U.S.C. § 2320(a)(2) (E). Congress also prohibited DoD from requiring contractors to relinquish their data rights as a condition for obtaining a defense contract. Id. §2320(a)(2)(F). This provision responded directly to contractors' complaints that they had insufficient bargaining power to refuse DoD negotiators' demands.^{18/}

^{16/} Pub. L. No. 99-661, § 953, 100 Stat. 3910, 3949 (1986) (current version at 10 U.S.C.A. § 2320 (1987)).

^{17/} H.R. Conf. Rep. No. 1001, 99th Cong., 2d Sess. 511, reprinted in 1986 U.S. Code Cong. & Admin. News 6570.

^{18/} Taylor & Burgett, supra note 5 at 9.

Finally, the Act required the publication of proposed regulations governing the acquisition of "technical data" within 3 months and final regulations within 6 months.^{19/} A crucial point bears noting here. Perhaps adopting the premise that software merits distinctive treatment, Congress had defined "technical data" in a previous statute to exclude computer software.^{20/} As a result, when Congress called for new "technical data" rules in 1986, it required changes only in the technical data rules, but not in the existing software rights-in-data provisions. Why these Congressional efforts at reform should address rights in technical data, but bypass rights in computer software is unexplained. Nevertheless, by requiring new data rights regulations without corresponding revisions in the software rules, Congress began to drive these two regulatory schemes apart.

B. President Reagan's 1987 Executive Order. On April 10, 1987, President Reagan issued an Executive Order implementing the Federal Technology Transfer Act of 1986 (Public Law 99-502) by requiring, inter alia, that heads of federal agencies and executive departments

"cooperate . . . in the development of a

^{19/} Pub. L. No. 99-661 § 953 (d), 100 Stat. 3952 (1986).

^{20/} See Department Authorization Act, 1985, Pub. L. No. 98-525, §1211, 98 Stat. 2492, 2589 (1984) (codified at 10 U.S.C. § 2302(4)).

uniform policy permitting Federal contractors to retain rights to software, engineering drawings, and other technical data generated by Federal Grants and contracts, in exchange for royalty-free use by or in behalf of the government."^{21/}

Thus, both the Executive Order and the Defense Acquisition Act of 1986 accepted the Packard Commission's view that both the government and the private sector will benefit from allowing private ownership rights in technological advancements developed with mixed funding. The Presidential directive went further in endorsing a licensing scheme which would allow developers to retain a proprietary interest in software funded entirely at Government expense. Against this backdrop, DoD software acquisition policies began to seem decidedly out of step with Congressional and Executive Branch initiatives. Indeed, the 1987 revisions in DoD's general data rights provisions offered little more than the appearance of compliance with the Congressional directive and Executive Branch policy.

C. The 1987 Revisions to the DFAR Supplement. As noted above, the 1987 data rights revisions were a response to the Defense Acquisition Act of 1986.^{22/} These 1987 revisions dealt with the rights-in-technical-data regulations -- but not

^{21/} Exec. Order No. 12591. "Facilitating Access to Science and Technology," 52 Fed. Reg. 13,414 (1987).

^{22/} Proposed regulations were first issued on January 16, 1987 in accordance with the Defense Acquisition Act. See 52 Fed. Reg. 2082 (1987). The final provisions were published on April 16, 1987. See 52 Fed. Reg. 12,390 (1987).

their software counterpart -- because Congress had excluded software from its directive by its limited definition of "technical data." See supra p. 11. Thus, in 1987 DoD simply republished the old software rules.^{23/} Adopting the Packard Commission's recommendation that software be treated as a "special case",^{24/} the Defense Acquisition Regulatory Council (DARC) formed an ad hoc committee to revise the software rules -- a committee that would never accomplish its mission, as will be shown below.

Nevertheless, it is worthwhile examining the 1987 revisions of DoD's general data acquisition regulations, because they illustrate DoD's resourcefulness in evading meaningful reform. In addition, the 1987 revisions introduced an innovation, the "Government Purpose License," which may eventually assume an important role in DoD's software acquisition policies.

Under its 1987 rights-in-data provisions, DoD adopted the strategy of asserting its traditional broad claims to "unlimited rights" data, while at the same time granting the contracting officer sweeping authority to waive these rights in return for a "Government Purpose License." The contracting officer could negotiate a Government Purpose License whenever 1) the contractor made a "substantial contribution" to the item's

^{23/} See Taylor & Burgett, supra, note 5 at 4.

^{24/} Packard Commission Report, supra, note 4, App. I, § V, at 123-24; cf. 52 Fed. Reg. 2082 (1987).

development;^{25/} 2) the government did not need "unlimited rights;" and 3) the contractor agreed to commercialize the technology. § 227.472-7 (1987). The regulations specifically noted that the intent of the Government Purpose License was to establish the contractor's proprietary interest and therefore promote wider application and development of the relevant technology. § 227.472-5(b) (1987). In fact, the Government Purpose License represents a highly artificial effort toward achieving this goal; despite its name, it has very little in common with the licensing agreements governing the transfer of data and software in commercial settings.

A principal drawback to the Government Purpose License is that, unlike commercial licenses, it cannot be molded to accommodate varying circumstances. The regulations require that the contractual provision containing the Government Purpose License be in exact accord with the regulations' definition of a "Government Purpose License." See §252.227-7013(b)(2)(ii)(B) (1987). That definition essentially ensures that the Government will always have unlimited rights for Government purposes:

"Government purposes license rights"
means rights to use, duplicate, or disclose
technical data . . . in whole or in part and

^{25/} The revisions established Government Purpose License Rights as the norm when the contractor contributed more than half of an item's development costs. §227.472-5(b) (1987). However, even when the contractor made "substantial contributions" that did not exceed fifty percent of an item's development cost, the contracting officer was instructed to "give consideration to obtaining less than unlimited rights." Id.; § 227.472-7 (1987).

in any manner, for Government purposes only, and to have or permit others to do so for Government purposes only. Government license rights include purposes of competitive procurement but do not grant the Government the right to have or permit others to use technical data. . . ." § 227.471 (1987).^{26/}

The use of a boilerplate provision, especially such an ambiguous one, hardly seems sufficient to protect a contractor's proprietary interest or to effectuate the regulations' stated policy of providing the Government with no more data rights than are actually needed. § 227.472-5 (1987). Though the Government may not release data for commercial purposes, competitors may still gain insights into valuable trade secrets by participating in the relevant DoD program. The regulations, moreover, specifically contemplate that DoD will disseminate data subject to Government Purpose License Rights so that other contractors may prepare bids for purposes of competitive procurement and support services. § 227.471 (1987). In sum, the Government Purpose License seems little more than a cosmetic response to Congressional and Presidential concerns that contractors be permitted to retain ownership rights in data generated from mixed-funding and that DoD reconcile its rights-in-data policies with commercial practices. It is unlikely that this innovation will vindicate the rights of software developers even if it should become a feature of DoD's software acquisition :

^{26/} The Government use and possible disclosure of data pursuant to a Government Purpose License Rights is royalty-free. § 227.472-7 (1987).

regulations.

D. The 1988 Dixon Amendments. Congress reacted to the 1987 data rights revisions in the so-called "Dixon Amendments" to the National Defense Authorization Act of 1988 with an attempt to nudge DoD towards conforming its concept of licensing more closely to the commercial model.^{27/} The statute specifically endorses the idea of direct licensing,^{28/} and prohibits the Government from interfering with third-party royalties for the use of data developed exclusively at private expense.^{29/} Furthermore, DoD is given permission to

"prescrib[e] reasonable and flexible guidelines, including negotiation objectives, for the conduct of negotiations regarding the respective rights in technical data of the United States and the contractor."^{30/}

The Dixon Amendments required that DoD implement these policy changes in revised rights-in-data provisions to take effect by April 1, 1988.^{31/} However, Congress once again excluded computer software from its directive, thereby ensuring that the software rules and the rules governing other technical

^{27/} Pub.L. No. 100-180, § 808, 101 Stat. 1128 (1987) (amending 10 U.S.C. § 2320).

^{28/} Pub.L. 100-180 § 808(a)(4)(C) (amending 10 U.S.C. 2320(a)(2)(G)).

^{29/} Id. § 808(a) (amending 10 U.S.C. § 2320(a)(1)).

^{30/} Pub.L. 100-180, 101 Stat. 1128, 1130 (1987) (amending 10 U.S.C. § 2320).

^{31/} Id. § 808(c).

data would continue to diverge.

E. The Administration's Draft Policy on Rights in Technical Data. In early 1988, the Office of Federal Procurement Policy released the "Administration's Draft Policy on Rights in Technical Data," pursuant to the President's 1987 Executive Order.^{32/} The draft policy, like the Dixon Amendments, requires that rights in data be established through negotiations, and similarly recognizes that such a policy will only be successful if contracting officers are provided with the necessary guidance. Accordingly, the rule states that the Government should not obtain rights in data, regardless of the source of funding, unless it first determines that there is a specific need. Even if such a need is identified, the Government must first consider other alternatives.^{33/}

F. The 1988 Interim Rule. In response to the Dixon Amendments, DoD published an interim rights-in-data rule and request for comments on April 1, 1988. 53 Fed. Reg. 10,780

^{32/} See 49 Fed. Cont. Rep. 402 (BNA) (March 7, 1988).

^{33/} Thus, the government should not acquire data if 1) the original item or substitutes are commercially available; 2) functional data or samples of the original item will adequately serve the Government's purposes; or 3) the original contractor is willing to furnish the data through alternate sources of supply through direct licenses or nondisclosure agreements. Id. Even if obtaining the data represents the only means of assuring competitive reprocurement, the Draft Policy recognizes that acquisition of the data may nevertheless be inappropriate -- for example, when the costs of acquiring the data are likely to exceed the savings resulting from competitive reprocurement. Id. at 402-403.

(1988)^{34/} However, because the Dixon Amendments did not address computer software, DoD did not feel obliged to complete its long-awaited revision of the software rules, and it once again republished the existing provisions. In fact, the ad hoc committee formed by the DARC in 1987 to formulate new software rules has now abandoned its efforts. The explanation offered for this development is that the DARC and the Civilian Agency Acquisition Council (CAAC) plan to unify civilian and military data acquisition regulations into a single body of uniform rules by September 30, 1988. See 52 Fed. Reg. 18,140 (1987). Accordingly, DARC believes attempts to formulate rules only for the military would be a wasted effort, and the software project has consequently been turned over to a joint committee of the DARC and CAAC.

In any event, DoD's 1988 approach to data acquisitions may reveal its thinking regarding software; the interim rule could very well anticipate revisions in DoD's software acquisition policies -- if only to confirm the Department's efforts to pursue traditional objectives under the guise of reform. Thus, the April 1, 1988 revisions give the appearance of bringing DoD rights-in-data policies into line with Congressional initiatives and the OFPP draft proposals by encouraging the negotiation of data rights, while handcuffing the negotiators

^{34/} The DAR Council will consider comments received by May 31, 1988 in formulating the final rule. 53 Fed. Reg. 10,780 (1988).

with detailed guidelines and objectives. In fact, the only question typically on the negotiating table is whether the Government should take unlimited rights or Government Purpose License Rights -- with all the inadequacies discussed above. See supra pp. 14-15. See generally § 227.473-1 53 Fed. Reg. 10,783 (1988).^{35/}

The new regulations adopt the same strategy as the 1987 version, asserting broad claims to "unlimited rights" data while further expanding the authority of the contracting officer to negotiate these rights away in favor of Government Purpose License Rights. The 1988 revisions thus follow the OFPP draft policy and the 1987 Executive Order in allowing Government Purpose License Rights in data developed exclusively with Government funding. § 227.472-3(a)(1) and (2), 53 Fed. Reg. 10,783-86 (1988).^{36/} Nevertheless, the Government Purpose License is the

^{35/} Where technical data pertains to items or processes developed "exclusively at private expense," the contractor may negotiate to grant the government "limited rights," which are similar to the rights the Government receives in "restricted rights software." See §§ 227.470; 227.472-3(b); 53 Fed. Reg. 10,781; 10,783 (1988).

^{36/} The mix of Government and private funding nevertheless remains a factor in determining whether Government Purpose License Rights are appropriate. § 227.473-1(b)(2)(E), 53 Fed. Reg. 10,784 (1988). Other factors include: whether the technology can be commercialized; further acquisition strategy; and the development of alternative sources of supply. § 227.473-1(b)(2), 53 Fed. Reg. 10,784 (1988). In addition, the contracting officer is instructed to consider the "[b]urden on the Government" of protecting the contractor's rights in the technical data and may not agree to a Government Purpose License where procurement will involve a large number of potential competitors. § 227.472-3(a)(2)(ii)(A).

same limited boilerplate provision found in the 1987 regulations, and is therefore completely unsuitable as a vehicle for imparting the desired flexibility into negotiations over data rights. Far from recognizing this problem, the regulations specifically reject the use of "non-standard" license rights "unless approved by the head of the contracting activity." § 227.473-1(b)(2)(iv), 53 Fed. Reg. 10,784 (1988).

The 1988 revisions further undermine the utility of the Government Purpose License by requiring that it expire and be replaced by unlimited Government rights. § 227.472-3(a)(2), 53 Fed. Reg. 10,783 (1988). Indeed, the regulations state that the Government's negotiating objective in most situations will be to obtain unlimited rights within a one to five year period. § 227.473-1(b)(2)(ii) and (iii), 53 Fed. Reg. 10,784 (1988). This result runs counter to the OFPP draft proposal as well as DoD's own stated policy of obtaining "only the minimum essential technical data and data rights." § 227.472-2 53, Fed. Reg. 10,782 (1988). We suspect, consequently, that the interim rule will be subject to much criticism from the private sector and will probably stimulate renewed reform efforts within Congress and the Executive Branch.

V. CRITICISM OF DoD's RIGHTS-IN-DATA POLICIES

Why DoD should adhere so recalcitrantly to its present policies remains a mystery. Traditionally, DoD has maintained that competitive procurement policies require extensive government rights in data in order to evaluate future acqui-

sitions and to solicit competitive bids. This attitude blends into the more general notion that government needs for proprietary technical data and software exceed those of private commercial customers. DoD has articulated its special needs as follows:

"Millions of separate items must be acquired, operated, and maintained for defense purposes. Technical data are required for training of personnel, overhaul, and repair, cataloging, standardization, inspection and quality control, packaging and logistics operations. Technical data resulting from research and development and production contracts must be disseminated to many different users. The Government must make technical data widely available to increase competition, lower costs and provide for mobilization." 53 Fed. Reg. 10,782, § 227.472-1(a) (1988).

Nevertheless, it is difficult to believe that the exigencies of the Government's mission routinely demand unlimited rights in software and data. The better explanation for DoD policy is that the Government relies upon the expenditure of public funds as an artifice to avoid the effort that would be required by a more carefully considered assessment of DoD's needs.

Even before the Packard Commission's widely publicized criticism of DoD's rights-in-data regulations, DoD's policy of requiring extensive rights in data and software had been challenged for undercutting Governmental objectives.^{37/} To be sure,

^{37/} Also instrumental in bringing about a reassessment of DoD's policies were the considerable efforts of the Software Engineering Institute of Carnegie-Mellon University, which was funded by DoD in 1985 and given the responsibility of investigating the (Footnote Continued)

acquisitions using "unlimited rights" software may decrease the cost of maintenance and reprocurement. However, the cost of the original contract may well increase because, "if contractors know they must lose [their proprietary interests in] data when dealing with the Government, they will almost certainly seek to recoup those losses when negotiating contract prices."^{38/} Thus, a broad assertion of rights in commercially valuable information and the resulting high risk of disclosure to competitors will "drive up the cost of technology the Government buys from industry, especially computer software that is in great demand in the commercial marketplace."^{39/}

This threat to commercial proprietary interests may deprive the Government of the most desirable software. The industry representatives who composed the Rights in Data Technical Working Group of the Institute for Defense Analysis (RDTWG) observed:

"Industry is reluctant to invest in new

results of DoD's approach to software acquisition. See, e.g., Martin and Deasy, The Basis for Reconciling Department of Defense and Industry Needs for Rights in Software (Vol. I of the Software Engineering Institute Report, Seeking the Balance Between Government and Industry Interests in Software Acquisitions) (SEI-87-TR-13 June 1987); Samuelson, Toward a Reform of the Defense Department Software Acquisition Policy (CMU/SEI-86-TRI April 1986); Commercial Models, supra note 3.

^{38/} OSD Data Rights Study Group, Who Should Own Data Rights: Government or Industry? Seeking a Balance at 16 (June 22, 1984) (unpublished report).

^{39/} Arthurs, Contractors Fume as Air Force Takes Off After Rights to Data, Legal Times of Washington, Feb. 27, 1984, at 8, col. 4.

technology for the government because [of] sweeping data rights demands by the government, and apprehensiveness about the loss of proprietary information. . . . This creates a climate unfavorable to the transfer of such technology [to the government]."^{40/}

The result of this hostile environment, RDTWG concluded, is that:

"the government is failing to obtain the most innovative and creative computer software technology from its software suppliers. Thus, the government has been unable to take full advantage of the significant American lead in software technology for the upgrading of its mission-critical computer resources."^{41/}

DoD's rights-in-data provisions must also be judged against civilian procurement policies. Each civilian agency promulgated its own data acquisitions provisions until the Small Business & Federal Procurement Competition Enhancement Act of 1984 mandated a revision of the FAR to establish uniform rules governing data rights.^{42/} These rules became effective on June 1, 1987, and, in contrast to the DoD regulations, adopt a strategy of limiting data delivery requirements.^{43/} For example, a contractor may withhold "restricted computer software" from the Government by substituting "form, fit and function data" in its

^{40/} Rights in Data Technical Working Group, Draft Final Report sections 2-3 (Nov. 22, 1983).

^{41/} Id. § 1-1.

^{42/} Pub.L. 98-577, § 301, 98 Stat. 3074 (1984).

^{43/} The proposed FAR rights-in-data provisions were first issued for comment on August 5, 1985, see 50 Fed. Reg. 32,870 (1985), but were not published in final form until May 13, 1987. 52 Fed. Reg. 18,140 (1987).

place. 48 C.F.R. § 27.404(b).^{44/} Restricting Government acquisitions to such functional data allows continued operation and maintenance of Government systems while, at the same time, reduces the risk that a competitor will obtain the additional information necessary to the reproduction of protected intellectual property.^{45/} Though the FAR only allows the substitution of functional data for privately-developed software and data, it is easy to see how this strategy might be extended to better effectuate administration policies of limiting data acquisitions to the necessary minimum.

Indeed, because of OFPP's directive that the CAAC and DARC promulgate uniform data acquisition rules for the civilian and military agencies, DoD may come under considerable pressure to adopt a similar approach. In the absence of a direct Congressional mandate, however, disagreement over such a fundamental point will probably stand in the way of unified regulations.

^{44/} "Form, fit, and function data" for computer software is defined as "data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements," but does not include "the source code, algorithm, process, formulae, and flow charts of the software." 48 C.F.R. § 27.401. The Government may request the actual software when necessary. 48 C.F.C. § 27.404(b).

^{45/} Under the FAR, a contractor may qualify privately-developed software for "restricted rights" status simply by adopting the procedures that would be necessary to preserve its intellectual property rights in an ordinary commercial setting. § 27.401.

VI. ANTICIPATED REFORMS

DoD's reluctance to heed Congressional and Executive calls for reform will undoubtedly lead to further initiatives to push DoD further in the direction of a licensing scheme that more closely corresponds to commercial practices. Ideally, renewed calls for case-by-case negotiation will result in software acquisition licenses that are carefully tailored to an individualized analysis of DoD's needs with respect to particular software and the developer's particular interests in retaining proprietary rights in that software. These arrangements are the norm in private industry and would permit DoD to obtain what it needs, but to pay for no more than it needs -- while at the same time allowing industry to protect its most innovative and proprietary data.^{46/}

Given existing resources, however, the wholesale adoption of such a scheme may initially be administratively unworkable.^{47/} DoD has expressly disapproved of nonstandard licensing arrangements and has warned of the "serious administrative burdens for contract support personnel and persons in industry who may be required to handle this data many years after the contract [is complete]."^{48/} As a first step, DoD might

^{46/} See Commercial Models, supra note 3 at 7.

^{47/} See 2 Nash & Cibinic Rep. paragraph 19, at 48 (March 1988).

^{48/} DoD Strawman Approach for New Technical Data, § 227.473-2. Inside the Pentagon 13 (January 22, 1988).

adopt a series of generic licenses, which respond to specific Government needs -- such as standardization, maintenance, or reprocurement -- but which are drafted far more tightly than the dubious "Government Purpose License."^{49/} Royalties would reflect the scope of the rights obtained under the license and the extent to which the software was generated by public financing. As contracting officers gain the necessary experience, they could gradually be afforded the latitude to deviate from this framework in favor of the more individualized approach discussed above.

Finally, Congress will no doubt make further attempts to reconcile DoD to the use of "direct licensing," a practice which will help transform the Government Purpose License into a more useful concept. Under this scheme, the Government could direct the licensor to enter into a licensing agreement with a designated third party if the Government deemed it necessary to disclose the software or data. As one commentary has noted, the use of direct licensing would allow "a contractor to make a business decision regarding the licensee and give[] the contractor direct control over enforcement through privity of contract."^{50/} DoD has been traditionally fearful that contractors would demand unreasonable conditions if allowed to

^{49/} See Commercial Models, supra note 3 at 7. Flexibility still should be permitted for unusual situations not addressed by the standard clauses. Id.

^{50/} OSD Study Group, supra note 36 at 21-22.

negotiate directly with third-parties.^{51/} However, the Government contract could protect the interests of the Government by specifying the royalty and other terms of any private license that the Government might require.^{52/}

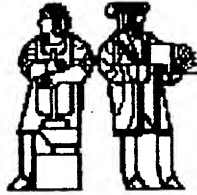
VII. CONCLUSION

DoD has labored unsuccessfully to accommodate its software rules to the framework of its current acquisition policy for other technical data. In fact, such an accommodation is impossible. The economics of the software industry simply do not comport with a procurement strategy that places vital proprietary interests at risk by a constant demand for unlimited rights.

Software differs from other data in the quality and quantity of the information it embodies; a competitor who gains access to this information not only usurps the value of the software itself, but also appropriates trade secrets that may represent a significant portion of the developing firm's market value. Indeed, even in the context of more enlightened policies, software should receive more extensive protections than other technical data. Those companies engaged in developing first-rate software should give strong support to Congressional and Executive Branch efforts to have DoD adopt a licensing scheme that is more closely attuned to a software developer's concerns.

^{51/} Taylor & Burgett, supra note 5 at 8.

^{52/} Greenberger, supra note 6 at 35.



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May 25, 1988

Mr. Charles W. Lloyd, Executive Secretary
DDASD(P)DARS, c/o OASD(PL)(MRS)
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Ref: DAR Case 87-303

Dear Mr. Lloyd,

The Massachusetts Institute of Technology wishes to submit the following comments with respect to the interim rule published at 53 FR 10780 under the DFARS Subpart 227.4 - Technical Data, Other Data, Computer Software, and Copyrights, and the clause at 227.252-7013.

It is our experience that P.L. 96-517, and the amendments of P.L. 98-620, have stimulated much stronger research relationships with industry and have encouraged the expansion of Institute activities directed toward the transfer of MIT generated technology.

It has become increasingly obvious, however, that the effective transfer of university generated technology requires dealing simultaneously not only with patentable inventions but also with technical data and software involving property rights other than patents.

For example, MIT has been working on nuclear magnetic resonance imaging devices which require a sophisticated and integrated hardware and software system; on symbolic processing, the backbone of artificial intelligence technology, which consists of a combined hardware and software system which allows computers to simulate human problem

solving and data processing techniques; and integrated circuits, which may involve a copyrightable, pattern-generating software program, a chip design copyright under the Semiconductor Chip Protection Act of 1984, a patent on the novel functions performed by the integrated circuit, and possibly a trademark.

The effective transfer of such technology requires a Federal policy for technical data and software which parallels that for patentable inventions. At the present time, however, Federal policy inhibits the effective transfer of many technologies which combine inventions, technical data, and software.

The interim rule would continue for DOD those features of current Federal policy which discourage U.S. companies from commercializing technologies resulting from Federally funded university research.

The revisions required so that the interim rule will, instead, provide an incentive for commercialization can easily be accommodated within the existing structure of the rule. Our specific recommendations are set forth below.

A. ACQUISITION POLICY.

The general acquisition policy set forth in Part 227.472-1 of the interim rule makes no mention of the role of universities in the dissemination of research results and transfer of technology.

Recommendation: That this part be modified to recognize that the obligations of the government with respect to the dissemination of research results can be fulfilled through technology transfer programs conducted by contractors.

B. UNLIMITED GOVERNMENT RIGHTS

Under the interim rule, the government acquires unlimited rights to technical data and to computer software generated in the course of a contract whether or not the data or software pertains to parts, components or processes needed for procurement; whether or not the government has a need for it; and whether or not it has been specified for delivery.

The existence of such broadly stated unlimited rights in the government, whether or not exercised, seriously inhibits the contractor's ability to effectively transfer technical data and software to the commercial sector. Our views are essentially the same as those expressed by Federal laboratory officials as reported in the GAO study "Technology Transfer - Constraints Perceived by Federal Laboratories and Agency Officials" (GAO/RCED-88-116BR), which was issued in March 1988.

Recommendation - Technical data: That the clause at 252.227-7013 under (b)(1), Unlimited Rights, (and in the text at 227.472-3 (a)(1)), be revised to provide that the government acquires unlimited rights under (i) only where the contracting officer has identified a specific need for the data which cannot be met through other means, and under (ii) only where delivery of the data has been specified as an element of performance.

Recommendation - Computer software: That the clause at 252.227-7013, under (c)(2), Unlimited Rights, be revised to provide that the Government acquires unlimited rights under (i) and (ii) only where delivery of such software is specified as an element of performance.

C. GOVERNMENT PURPOSE LICENSE RIGHTS IN TECHNICAL DATA

Subparagraph 227.472-3(a)(2) of the interim rule provides an exception to unlimited Government rights so that the Government may agree to accept Government Purpose License Rights in order to "encourage commercial utilization of technologies developed under Government contracts..."

This exception is not available, however, where the "(B) Technical data must be published (e.g., to disclose the results of research and development efforts." This appears to regress from the philosophy reflected in the rule published at 52 FR 12390 on April 16, 1987. That rule provided in subpart 9227.472-5(b) that, in cases of mixed funding, unless the contracting officer determines during the identification of needs process that unlimited rights are required, the Government will accept Government Purpose License Rights if ".....the contractor is a small business firm or nonprofit organization that agrees to commercialize the technology."

The interim rule can easily be interpreted as a specific constraint on the ability of universities and other contractors to transfer technology generated in the course of basic and applied research programs.

Recommendation: That 227.472-3(a)(2)(ii)(B) be omitted and a new section added which provides that the contracting officer shall agree to accept GPLR when the contractor is a small business or non-profit organization which agrees to commercialize the technology, except where unlimited rights are required for the purposes of competitive procurement of supplies or services, .

D. GOVERNMENT ACQUISITION OF RESTRICTED RIGHTS IN COMPUTER SOFTWARE

As noted above, the effective dissemination of software by those who created it requires the same policies as patents, but unlimited government rights have inhibited such dissemination and commercialization.

Recommendation: In the clause at 252.227-7013, revise (c)(1) by adding a new subparagraph (c)(iii) providing that the contracting officer shall agree to accept restricted rights when the contractor is a small business or non-profit organization which agrees to commercialize the technology unless unlimited rights are required for the purposes of competitive procurement of supplies or services.

E. NEGOTIATION FACTORS

It is quite likely that university research will frequently involve mixed funding. More specific guidance should, therefore, be provided with respect to the negotiation of government-university rights in technical data and computer software.

Recommendation: That a new subparagraph (D) be added to (b)(2)(ii) to provide that when the government does not have a need to use the data for competition and the contractor is a university or other nonprofit which is interested in commercializing the data, the government will negotiate Government Purpose License Rights.

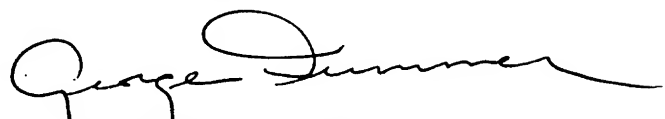
F. THE SBIR PROGRAM - AN ALTERNATIVE

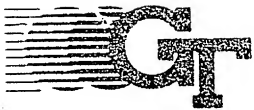
We believe that in contracts for basic or applied research, Alternate II of the clause at 252.227-7013, which is mandated by statute for the SBIR Program, would be an appropriate alternative to the recommendations set forth above.

Recommendation: That substitute paragraphs (b) and (c) of Alternate II to the clause at 252.227-7013, be stipulated for inclusion in all contracts awarded to non-profit organizations for the conduct of basic or applied research, which do not require the delivery of technical data or computer software needed by the Government for the competitive procurement of items, components, or processes.

We appreciate the opportunity to comment on the interim rule. The transfer of technology resulting from research funded by the Federal agencies and by U.S. industry is an important and expanding activity at MIT and other universities. DOD is in a position to adopt a policy with respect to technical data and software which will significantly and substantially enhance this effort. We urge you to do so.

Sincerely,


George H. Dummer
Director



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May 30, 1988

Mr. Charles W. Lloyd
Executive Secretary
ODASD(P)DARS
c/o OASD(PL)(MRS)
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Ref: DAR Case 87-303

Dear Mr. Lloyd:

This letter is submitted in support of the position of the Council on Governmental Relations (COGR) in their 11 May 1988 letter on the above referenced matter. Georgia Tech, as both a major research university in the area of information technology and developer of computer software which has been successfully commercialized, urges the implementation of a Federal policy on computer software and data which parallels that contained in Public Law 96-517. P.L. 96-517 has facilitated stronger research relationships between research and industry. This benefit should be expanded across the broad spectrum of intellectual property.

As was pointed out in testimony given by M.I.T.'s George H. Dummer on 30 April 1987 before the U. S. House of Representatives Committee on Science, Space and Technology, Subcommittee on Science, Research and Technology, the effective transfer of university generated technology requires the consideration of different (trade secret, patent, copyright) intellectual property rights. Technology can no longer be cleanly categorized as only having one kind of right subsisting within it.

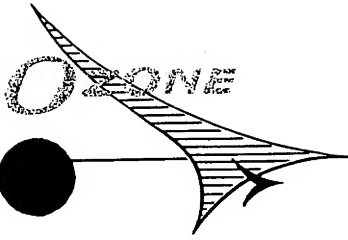
Georgia Tech is one of many universities facing this issue. The technology developed in university laboratories under Federal sponsorship comprises only the starting point for technological innovations which are a necessary part of our maintaining our position in the worldwide scientific community. A progressive, consistent set of Federal policies in the area of intellectual property ownership and rights would have a positive effect which would benefit not only universities, but the nation as well.

We would be pleased to provide additional information at your convenience.

Sincerely,
Georgia Institute of Technology

J. W. Dees, Director
Office of Contract Administration

cc: Milt Goldberg, Executive Director
of COGR



OZONE INDUSTRIES, INC.

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25 May 1988
PR88-2627

Defense Acquisition Regulatory Council
ODASP (P) DARs, c/o OASD (P&L) (MRS)
DAR CASE 87-303
THE PENTAGON
WASHINGTON, DC 20301-3062

Attention: Mr. Charles W. Lloyd,
Executive Secretary

Subject: New Interim Dod Data Rights Regulations
(effective 4/4/88)

Dear Mr. Lloyd:

Ozone Industries endorses the comments submitted by PIA
on the subject regulations.

Very truly yours,

OZONE INDUSTRIES, INC.


J.F. Ceccarelli
President

JFC/ebs



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May 30, 1988

Mr. Charles W. Lloyd
Executive Secretary
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c/o OASD(PL) (MRS)
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Ref. DAR Case 87-303

Dear Mr. Lloyd:

North Carolina State University hereby submits the following comments with respect to the interim rules published at 53 FR 10780 under the DFARS Subpart 227.4 - Technical Data, Other Data, Computer Software, and Copyrights, in support of the positions taken in the letter written to you by Milton Goldberg, Executive Director of COGR, dated May 11, 1988.

In our opinion, adoption of the interim rule as proposed by the Department of Defense will continue the negative impact on successful technology transfer already felt as the result of the DOD, DOE and NASA Rights in Technical Data and Computer Software regulations implemented by those agencies while awaiting finalization of FAR Subpart 27.4. By failing to reconcile the government's rights in technical data and computer software with the changes in the Federal patent policy which occurred in 1980, the agencies have neglected to recognize that technology now emerging from the universities has progressed beyond the stage of individual concept development. Now, more often than not, University research generates discoveries which deal in multiple areas of intellectual property rights and are developed over a significant period of time. In many instances discoveries must be combined into a single package and transferred as a unit if they are to be of value in the technology race.

While it is this new level of sophistication that makes Federal funding of university research a priority if the United States is to retain its position as a world leader in the advancing technologies, the fruits of university/government collaboration will not benefit the citizens of the United States as long as government procurement regulations serve as a disincentive to effective technology transfer.

By way of example, North Carolina State University is currently negotiating with a start-up company to further develop a CAD/CAM System for the design and manufacture of Custom/Orthopaedic shoes.

Mr. Charles W. Lloyd
May 30, 1988
Page 2

The project was initially begun with funding from the Veteran's Administration administered through NASA. While several hundred thousand dollars have already been spent on the project by the Federal government, there is insufficient Federal funding to complete the work. A start-up company has agreed to commit in excess of one-half million dollars to finish the project if it can be assured of securing adequate rights to ensure that it will be able to commercialize the CAD/CAM Footwear System with some reasonable expectation of recouping its R&D investment as well as realizing some profit for its investors. When finished, the System will combine expert system software, applications software, technical data by way of designs, and patented hardware.

While the University can guarantee the start-up company an exclusive position with regard to patents as a result of Public Laws 96-517 and 98-620, we cannot give the company any assurances with respect to the technical data and computer software developed with Federal funding due to the unlimited rights guaranteed to the Federal government under agency regulations. Both this University and the start-up company have encountered significant frustration in trying to resolve these issues with the agencies in an effort to avoid abandoning the project. While this University stands to lose funding for a project it would like to see completed from the standpoint of education and research, the general public stands to lose a much-needed technology, the effective use of public money, and an opportunity to see a new company develop.

While subparagraph 227.472-3(a)(2) of the interim rule goes part way in resolving conflicts similar to the one described by providing a vehicle to limit Government rights through application of the Government Purpose License Rights, the exception under (2)(ii)(B) operates to defeat the purpose of the GPLR exception. In order to cure this obvious defect, and to provide the universities with a reasonable opportunity to transfer, for commercial use, both technical data and computer software which is not necessary to competitive government procurement, this University strongly urges the acceptance of COGR Recommendations 6 through 8 on pages four, five and six of Mr. Goldberg's letter. In the alternative, we join in endorsing COGR's Recommendation 9 to provide for a new section 227.483 to be added to the SBIR Program regulations or for modification of existing Section 227.479 to include university research programs.

Thank you for allowing us this opportunity to comment.

Very truly yours,



Franklin D. Hart
Vice Chancellor for Research



International Business Machines Corporation

6705 ROCKLEDGE DRIVE
BETHESDA, MARYLAND 20817

May 31, 1988

Defense Acquisition Regulatory
Council
ODASD (P) DARS
C/O OASD (P&L) (MRS)
Room 3D139
The Pentagon
Washington, DC 20301-3062

Attention: Mr. Charles W. Lloyd
Executive Secretary

Reference: DAR Case 87-303

Dear Mr. Lloyd:

The International Business Machines Corporation (IBM) is pleased to respond to your request for comment concerning the interim changes to Subpart 227.4 and Part 252 of the Defense Federal Acquisition Regulation Supplement (DFARS). We are also participating with CODSIA and ADAPSO in formulating their responses. However, we wish to address the following issue directly as it is of primary importance in the sale of commercial ADPE products.

IBM's comment concerns Subpart 227.472-3(b)(1) "Limited Rights" which requires Technical Data in the form of privately funded, commercially available "Manuals or Instructional Materials for installation, operation, maintenance or training purposes" to be provided with Unlimited Rights per Subpart 227.472-3(a)(iv).

IBM notes that the Subpart, which is identical to previous versions of the Regulations, clearly impinges on the copyright existing in such documentation and is inconsistent with the legislative intent for the Interim Regulations.

This impingement on an owner's copyright in such documentation is contrary to the expressed intent of the recent statute, PL99-661, which underlies this Regulation, as well as the philosophy of Executive Order 12591. PL99-661 directs that the mandated Technical Data Regulation not impair any right of any contractor with respect to patents or copyrights. Furthermore, the accompanying legislative conference report advises that the Department of Defense should generally seek to acquire the same rights in data that a commercial customer would be granted in acquiring the same products.

1469-88/1A/AC

Mr. Charles W. Lloyd
Page -2-
May 31, 1988

IBM further notes that the subpart treats such documentation differently than similar documentation related to commercial computer software which is treated in Subpart 227.481(a)(f). The former provides a "Unlimited Rights" classification to such documentation, whereas the latter provides a "Restricted Rights" classification.

This difference in treatment was considered in a study authorized by DOD and conducted by the Software Engineering Institute of the Carnegie-Mellon University. The study is described in a technical report published by Carnegie-Mellon University, entitled "Proposal for a New 'Rights in Software' Clause for Software Acquisitions by the Department of Defense", by Pamela Samuelson, et al., dated September 1986. The study states that privately funded documentation should not be subjected to Limited Rights, but should be subject to the same restriction as commercial documentation related to software which receives Restricted Rights. To do otherwise causes confusion and deters many firms from selling rights in their valuable technology to DOD.

IBM submits that (1) the intent of Congress should supersede a contradictory and too literal interpretation of its provisions concerning Manuals or Instructional Materials, and (2) there is no substantive reason for different treatment as between documentation related to software and other documentation when both are commercially available.

Accordingly, IBM recommends, for the reasons indicated above, that Subpart 227.472-2(a)(iv) be changed, as follows, to treat in the same manner as documentation provided under Subpart 227.481(a)(f):

In line 2, after "data" insert -- "or privately funded, commercially available data."

Likewise, a similar insertion should be made in Part 252.227-7013(b)(1)(iv); Alternate II (April 1988), and as otherwise required in the Regulations so as to be consistent with Subpart 227.472-2(a)(iv) as modified above.

This change should bring the Regulation into concert with the stated acquisition policy that the Department of Defense should obtain the same rights in data that a commercial customer would be granted in acquiring the same products.

Please accept my appreciation for the opportunity to provide you with IBM's views with respect to the Interim Regulations.

Sincerely,



Bruce E. Leinster
Federal Systems Contracts Manager

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS (CODSIA)

1620 Eye Street, N.W., Suite 1000
WASHINGTON, D.C. 20006

(202) 659-5013

June 2, 1988
DAR Case 87-303
CODSIA Case 3-85

Mr. Charles Lloyd
Executive Director
Defense Acquisition Regulatory Council
OASD(P&L)DASD(P)DARS
c/o Room 3D139 The Pentagon
Washington, D. C. 20301-3062

Dear Mr. Lloyd:

On April 1, 1988, the Defense Acquisition Regulatory Council issued, as an interim rule, regulations covering rights in technical data and requested comments on these regulations. The undersigned associations are pleased to provide our principal objections which are summarized below and illustrated in an attachment to this letter. Detailed comments, including other major areas of concern, will be provided under separate cover.

In general, we note that the April 1988 interim regulations, as did the May 1987 regulations, fail in several areas to incorporate explicit statutory language which is needed to provide clear policy and regulatory direction to contracting officers. In some areas, the regulations clearly repudiate Congressional direction and intent. In still other areas, while the regulations purport to follow the law or the President's Executive Order 12591, they do not. In our view, the DAR Council has failed again, significantly, to approach these data rights issues from the Congressionally-mandated perspective of balancing both the government's and the contractors' interest. Rather, we believe that this interim rule is an effort to interpret statutory language which perpetuates prior flawed data regulations and DoD preferences.

The introductory statements at 227.472-1 (relating to the general acquisition policy for technical data) and at 227.472-2 (relating to establishing minimum government needs) purport to provide a "balance of

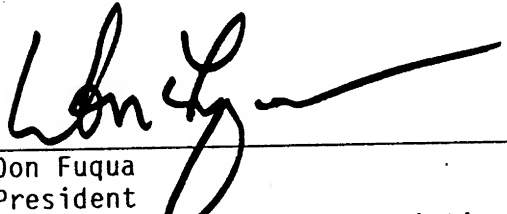
interests" policy. However, the regulations which follow fail to implement this policy, and often conflict with it. The following examples illustrate this:

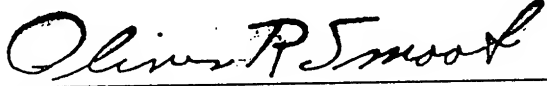
- a) The language at 227.472-1(c)(3) emphasizes that a principal reason to avoid acquisition of unnecessary technical data is that such acquisition is burdensome for the government, without adequately addressing the contractor's rights;
- b) The regulation does not differentiate adequately between the acquisition of data and rights in data acquired and therefore does not provide clear guidance to either the government or its contractors;
- c) The regulations impose excessive and burdensome paperwork and reporting requirements, far beyond the government's legitimate need for information or the expected utilization of data with other than unlimited rights;
- d) The certification and data requirements of the regulations are effective immediately even though contractors and subcontractors have not heretofore collected and maintained data for data rights purposes in that form and contracting officers are not able to negotiate alternatives;
- e) The sanctions for failing to comply with the prescribed procedures could mean the invalidation of data rights - a penalty prohibited by the statute;
- f) The regulations relegate commercial rights to a secondary issue, yet the President's Executive Order encourages such commercialization for items developed under federal contracts;
- g) The regulations foster tensions between the government and its primes, and between primes and subcontractors and will encourage litigation and confrontation rather than facilitate negotiation of rights in data.

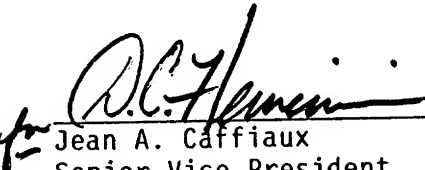
We understand that the Proprietary Industries Association (PIA) has submitted detailed comments on this regulation. We have discussed their comments with PIA and generally support their concerns and recommendations.

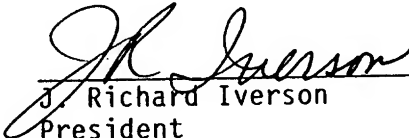
In summary, the DAR Council should withdraw the April 1 regulations and substantially re-write them to bring them into compliance with the law and the President's Executive Order. We look forward to meeting with the Council at the earliest opportunity to review in detail our concerns and with the interim regulations.

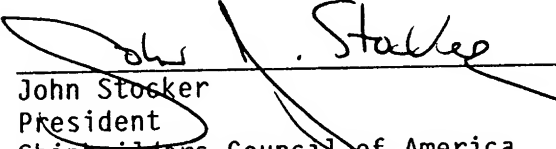
Sincerely,

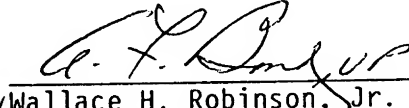

Don Fuqua
President
Aerospace Industries Association


Oliver R. Smoot
Executive Vice President
Computer and Business Equipment
Manufacturers Association


Jean A. Caffiaux
Senior Vice President
Electronic Industries Association


Richard Iverson
President
American Electronics Association


John Stocker
President
Shipbuilders Council of America


Wallace H. Robinson, Jr.
President
National Security Industrial
Association

Attachment

CODSIA'S MAJOR OBJECTIONS
TO THE
DoD INTERIM TECHNICAL DATA REGULATIONS

1. The definitions of "Developed Exclusively at Private Expense" and "Required as an Element of Performance Under a Government Contract or Subcontract", when read together, create substantial uncertainty as to what is intended to be Limited Rights data. Further, the definitions could result in demands by the Government for data rights protected by statute. The definitions introduce an issue concerning work implicitly required by a Government contract versus work that is expressly specified in the contract. The phrase "or that the development was necessary for performance of a Government contract or subcontract" is particularly expansive, subject to multiple interpretations, and must be deleted. The Government should only get unlimited rights in technical data resulting from direct and expressly required development of items, components or processes. Actually, and as noted in the conference report accompanying the Defense Acquisition Improvement Act of 1986, the Government should acquire only the same rights in data that a commercial customer would acquire in purchasing the same product.
2. The certification requirements are not limited to data to be delivered under the contract and are tantamount to acceleration of the validation process. This will precipitate an untimely and costly effort. Particularly, the "Certification of Development of Technology with Private Funding" will require the collection of voluminous supporting data (possibly equivalent to the hundreds of thousands of pages usually required to support cost and pricing data on complex products). There is no demonstrated need for such detail prior to an award of a contract. All that is needed prior to award or until data rights are challenged by the Government should be a notice of intended use and a list of asserted private expense data. When questions about a contractor/subcontractor claim of rights in submitted data arise, they can be settled through the validation process of the regulation with far less burden to all parties. The certification procedures should be deleted in their entirety.
3. Direct licensing should be affirmatively provided as a less intrusive, and often preferred, alternative to the government acquisition of technical data and/or to the acquisition of data with rights greater than Limited Rights. The failure to include direct licensing in the regulations ignores 10 USC 2320(a)(2)(G)(iii) and the Packard Commission Report. Direct licensing would provide an industry practice proven to be a cost-effective method of broadening the industrial base and ensuring alternative sources of supply.

4. The regulation requires that all data which is to be provided to the Government with less than unlimited rights must be identified in a contract list (paragraph (k) of the clause at 252.277-7013). A contractor's omission of limited rights data from this list, even though inadvertent, could result in automatic loss of rights. The previous regulations provided for government acceptance of a contractor's notice of limited rights technical data when such became known and did not require a specific listing. The interim regulation should be revised to reinstate this workable procedure. Without such amendment or revision, the burden of contract renegotiation, for example, will be required every time a subcontractor is engaged.
5. The regulations omit authority for marking restrictive legends on contractor/subcontractor technical data resulting from experimental, developmental, or research work performed at private expense and unrelated to "developed" items, components or processes. A provision comparable to 227.472-3(a)(1)(ii) for Federally funded data is required to correct this inequity and achieve a balance between Government and contractor rights.
6. The May 1987 version of the clause at 52.227-7035, "Pre-Notification of Rights in Technical Data", required offerors to identify items developed at private expense which they intended to deliver under a resultant contract. This clause has now been broadened significantly to: a) require notification with respect to items, components or processes which the offeror proposes to use in performance; b) include potential subcontractors; c) cover items, components, etc., developed (i) at private expense, (ii) with mixed funding, or (iii) government expense; and d) require notification of the offeror's contribution in mixed funding situations. This is unnecessarily broad and would be extremely costly to administer. Furthermore, it is not feasible to provide such identification at the time of proposal response. The May 1987 provision should be reinstated.
7. The time periods for expiration of limited rights which were authorized (as negotiation objectives) under 10 USC 2320 provide for subsequent use of technical data only for U.S. Government purposes, not unlimited rights as now provided by 227.472-3(a)(2)(i) of the interim regulation. Since there is not a statutory prescribed time limit for Government Purpose License Rights nor a statutory requirement dictating that there always be a time limit on limited rights, the regulation and policy of the interim rule must be changed to reflect the flexibility provided by statute.
8. To the extent that a standard non-disclosure agreement is provided in the regulations, the agreement should be between the recipient and the contractor and should be consistent with commercial practices, allowing for exceptions such as public domain information, etc.

9. The certification and marking procedures under the regulations, should they remain in some form, must be changed so that the Government negotiates rights directly with the contractor/subcontractor asserting such rights in the technical data. The law could not be more clear on this point. Contractors/subcontractors should have the right of appeal under the Disputes Act for adverse data rights decisions as they do in validation procedures.
10. Under the definition of "Developed Exclusively at Private Expense", the regulations state that IR&D/B&P are private expense. However, the next sentence states that "all indirect costs" (which would include IR&D/B&P) are considered government funds when development was required as an element of performance. This lead-in must be changed to "other indirect costs" to eliminate any ambiguity in construction and to preserve the statutory recognition of IR&D/B&P as "private expense."
11. The word "only" should be inserted in clause 252.227-7031, Data Requirements", to conform to the policy stated at 227.475-1(b), and to ensure that the CDRL and FAR/DFARS are the only sources for data requirements.
12. The definition of "unpublished" should apply to all technical data delivered to the Government, not just to data delivered with other than unlimited rights. Delivery to the Government, by itself, does not constitute publication or release to the public. If it did, delivery of unlimited rights technical data would place the contractor in automatic violation of security regulations with respect to classified information and in violation of law for ITAR controlled data.
13. 10 USC 2320(a)(i) provides that the regulations shall not "impair the rights of any contractor with respect to patents or copyrights or any other rights in technical data established by law." This statutory provision has been omitted from the listing of prohibitions under 227.473-2. Further, the regulations specifically impair the contractor's copyright interest by granting the government a license in the copyrights.
14. As drafted, the "Special Works" clause at 252.227-7020 permits the government to acquire title in technical data as opposed to specific data rights where no Special Work is involved. The regulations dealing with "Special Works" should not be used to obtain ownership or control of technical data in and of itself, but merely ownership or control of the document produced as a special work. The categories of rights in technical data that the Government acquires are established by 227.472-3.



**Aerospace
Industries
Association**

87-303

LeRoy J. Haugh
Vice President
Procurement and Finance
371-8520

May 10, 1988

Mr. Duncan Holaday
Director, Defense Acquisition
Regulatory Council
OASD(P&L)DASD(P)DARS
c/o 3D139 The Pentagon
Washington, D. C. 20301-3062

Dear Duncan:

On behalf of the AIA Intellectual Property Committee, I sincerely appreciate your participation in our Joint Session on April 19.

The members of the Committee recognize the difficult task you have in achieving uniformity among the military departments in the matter of data rights and certainly appreciate the effort that has gone into the interim regulation which was promulgated on April 1. While I am sure we will continue to have our differences with respect to parts of the regulation, I hope we can continue to work together constructively towards ultimately achieving the balancing of interests that Congress has directed and also a single government-wide regulation on this subject. Again, we very much appreciate your taking the time to be with us and your willingness to discuss candidly DoD's plans.

Sincerely,

LeRoy J. Haugh
Vice President
Procurement and Finance



**Aerospace
Industries
Association**

LeRoy J. Haugh
Vice President
Procurement and Finance
371-8520

March 18 , 1988

Mr. Duncan Holaday
Director, Defense Acquisition Regulatory
Council
OASD(P&L)DASD(P)DARS
c/o 3D139 The Pentagon
Washington, D. C. 20301-3062

Dear Duncan:

On behalf of the Aerospace Industries Association's Intellectual Property Committee and its Chairman, Bob Walker, I sincerely appreciate your acceptance of an invitation to participate in the Joint Government/Industry Session of the annual meeting of the Committee to be held in Baltimore, Maryland.

The meeting, which will be held on April 19, 1988 at the Omni International Hotel, will convene at 9:00 a.m., recess by 5:00 p.m. and includes a luncheon. A reception and dinner will be held on the evening of April 19, at 6:30 to which all attendees, participants and their guests are invited. An informal reception will also be held on the evening of April 18 from 6:00 to 7:00, to which you are cordially invited.

The Joint Session is informal, as are any presentations. Past experience indicates that both government and industry participants benefit greatly from the opportunity to meet and discuss problem areas of mutual concern.

Attached is a tentative schedule for the Joint Session, a list of expected government participants and a hotel reservation form, which should be returned to the Omni Hotel no later than March 25, 1988.

Should you desire further information, please contact me or Ruth Hall at 202/371-8520.

Sincerely,

LeRoy J. Haugh
Vice President
Procurement and Finance

Attachments

TENTATIVE AGENDA
AIA INTELLECTUAL PROPERTY COMMITTEE MEETING
April 19, 1988
Baltimore, Maryland

GOVERNMENT/INDUSTRY PARTICIPATION DAY

8:00 a.m. Continental Breakfast

9:00 a.m. Welcome Chairman Robert Walker

- 9:05 a.m. 1. Joe Allen, Department of Commerce
"Latest Developments in Federal Technology"
2. Al Solga, Department of Commerce
"Export Controls"

10:00 a.m. Coffee Break

10:15 a.m. Panel on Intellectual Property Policy
Duncan Holaday, Director, DAR Council
Steve Mourningham (DoE), representing the Civil
Agency Acquisition Council
Pamela Samuelson, University of Pittsburgh
Law School, representing the Software Engineering Institute
Nancy Wentzler, Office of Federal Procurement Policy
A wide ranging review and discussion of policy questions and pending
regulations. E.g., the Dixon Amendment on data rights - What's next?
What's ahead in software coverage? Prospects for a single Government
policy? A single regulation?

12 Noon Reception

12:30 p.m. Luncheon

Speaker: Michael Kirk, Assistant Commissioner for External
Affairs, Office of Legislation and
International Affairs, U.S. Patent Office

An update on data rights in the GATT agreement

2:00 p.m. Legislative update (Congressional Staff participants yet to
be confirmed)

2:30 p.m. Military Departments' Views on Rights in Technical Data
and Computer Software

Air Force - Participants to be confirmed

Navy - Linda Greene, Navy Policy Member, DAR Council

Mary Sullivan, Navy Legal Member, DAR Council

Army - John Conklin, Army Policy Member, DAR Council

Robert Gibson, Asst. Command Counsel, Intellectual
Property Law, AMC

NASA - Robert F. Kempf, Associate General Counsel (Intellectual
Property)

What are the peculiar needs of the Military Departments (and Major
Commands) that make uniform implementation such an elusive goal?

5:00 p.m. Adjournment

6:30 p.m. Reception - Dinner

Expected Government Guests
AIA Intellectual Property Committee Meeting
April 19, 1988
Baltimore MD

Dr. Nancy Wentzler
Deputy Associate Administrator
Office of Federal Procurement Policy

Ms. Mary Sullivan
Office of General Counsel
Department of the Navy

Mr. Robert Kempf
Associate General Counsel (Intellectual Property)
NASA Headquarters

Mr. William C. Garvert
Deputy Counsel, Navy Intellectual Property Policy
Office of the Chief of Naval Research

Mr. W. B. Montalto
Procurement Policy Counsel
Senate Committee on Small Business

Mr. Duncan Holaday
Director, Defense Acquisition Regulatory Council
OASD(P&L)DASD(P)DARS

Mr. Richard Summerour
SAF/AQCS
U.S. Department of Energy

Mr. Donald J. Singer
AF/JACP

Mr. Joseph Allen
Department of Commerce

Mr. Al Solga
Department of Commerce

Ms. Linda Greene
Navy DAR Council Representative

Mr. Fred Kohout
Office of Contract Policy & Administration
OASD (P&L)

Ms. Pamela Samuelson
University of Pittsburgh Law School

Mr. Michael Kirk
Assistant Commissioner for External Affairs
Office of Patents and Trademarks

HOTEL RESERVATION FORM

AIA INTELLECTUAL PROPERTY COMMITTEE MEETING

April 18-19, 1988

Omni International Hotel - Baltimore, MD

RESERVATIONS MUST BE MADE NO LATER THAN MARCH 25, 1988

MAIL TO: Reservations Manager
Attention: Sue Karr
Omni International Hotel
101 West Fayette Street
Baltimore, MD 21201

OR CALL: (301) 752-1100, Sue Karr

NAME _____ TITLE _____
COMPANY _____ TELE. NO. _____
ADDRESS _____

Accommodations Requested:

_____ Single \$85.00 _____ Double \$85.00
_____ Smoking _____ Non-Smoking

Dates:

April 17 _____ April 18 _____ April 19 _____ April 20 _____

If you wish to guarantee arrival past 6 p.m. please check here _____

Credit Card No.: _____ Ex. Date _____

Arrival Date _____ Time _____

Departure Date _____ Time _____

PERLMAN & PARTNERS

A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION
1233 TWENTIETH STREET, N.W.
SUITE 700
WASHINGTON, D.C. 20036
TELEPHONE (202) 223-6455

DAVID S. PERLMAN, P.C., DC, MA, FL
JOSEPH T. CASEY, JR., DC
ALVIN A. SCHALL, DC, NY

TELECOPY: (202) 785-2281
TELEX: 197942 CCM DC

May 31, 1988

Defense Acquisition Regulatory Council
Attention: Mr. Charles W. Lloyd, Executive Secretary
ODASD(P)DARS
c/o OASD(P&L) (MRS)
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Subject: DAR Case 87-303

Dear Mr. Lloyd:

On behalf of certain manufacturers involved with sales of manufactured commercial goods to the Department of Defense, we wish to make the following comments concerning the proposed changes to DFARS Subpart 227.4:

(1) DFARS 227.472-3(a)(iii) deals with rights in technical data pertaining to "items, components or processes prepared or required to be delivered under any Government contract or subcontract."

The individual terms "items", "components" or "processes" should be defined. They are not defined in either the regulations, the statutes, or relevant case law. Confusion arises, for example, when there is a technical data called for on "parts" as opposed to "components".

For a commercial manufacturer interested in doing business with the government, the insistence on rights in parts, when it is not necessary for full utilization or maintenance of the end items being acquired, is a substantial deterrent. Competition is discouraged when undue data deliveries are required. For the commercial manufacturer, this is a matter of the utmost importance.

(2) Also with respect to this subsection, it should be made clear that the Government is entitled to form, fit and function data on what is to be delivered to the Government, and not on the components that may be included in what is to be delivered.

Defense Acquisition Regulatory Council
31 May 1988
Page 2

For example, where the Government is acquiring commercial end items, it needs form, fit and function information for acquisition, maintenance and operation of those end items, not on the processes involved in manufacturing them, or on the components included in them.

To require form, fit and function data on individual components in commercial end items which have been developed at private expense violates the statutory prohibition of 10 U.S.C. 2320(a)(2)(F) against requiring a contractor to relinquish rights in data developed exclusively at private expense. The statutory authorization to require form, fit and function data with unlimited rights runs only to items to be delivered, not to the components included in those end items. Thus, a broad interpretation (or misinterpretation) of the current regulatory language may result in an inadvertent violation of the statutory prohibition (which is generally dealt with in DFARS 227.473-2).

Clarification of the prohibition against requiring unlimited rights in component data, when commercial end items are being acquired, would avoid future violations of the statutory prohibition.

If further information on these points is appropriate, please advise, and we will supplement these comments with specific case examples.

Very truly yours,



Ronald S. Perlman



the computer software and services industry association

25 years of leadership

GEORGE T. DEBAKEY
EXECUTIVE DIRECTOR

May 31, 1988

Defense Acquisition Regulatory Council
Attn: Mr. Charles W. Lloyd, Executive Secretary
ODASD(P) DARS
c/o OASD (P&L) (MRS)
Room 3D139
The Pentagon
Washington, D.C. 20301-3062

RE: DAR Case 87-303

Dear Mr. Lloyd:

What follows are the comments of ADAPSO, The Computer Software and Services Industry Association, Inc. (ADAPSO) regarding the interim changes to Subpart 227.4 and Part 252 of the Defense Federal Acquisition Regulation (DFAR) Supplement governing rights in technical data. ADAPSO submits these comments in the interest of streamlining the Defense Department acquisition process, avoiding Government acquisition of technical data rights that are unnecessary for the Government to fulfill its mission or that are overly burdensome to maintain, and encouraging the development of future technologies, particularly where commercialization will advance technological development.

ADAPSO is the trade association of this nation's computer software and services industry. Its member companies and industry provide the public and the government with a variety of computer software and services including network-based information services, sophisticated software for mainframe, mini-, and microcomputers, professional systems analysis, design, and programming services, and integrated hardware/software systems. ADAPSO's members and industry are major contractors with the Federal Government, particularly the Department of Defense, giving ADAPSO a significant interest in this proceeding.

ADAPSO supports the policy set forth in Subpart 227.472-1(a) and (b), recognizing a Government interest in encouraging contractors to develop new technologies and to improve existing technologies by allowing contractors to exploit their efforts commercially. To this end, ADAPSO applauds Subpart 227.472-3(c) which requires negotiation where technical data is developed with mixed funding and the provisions of Subpart 227.473-1(b)(i), outlining specific criteria by which a contracting officer is to negotiate rights in technical data developed with mixed funding.

At the same time, ADAPSO urges the Department to move quickly to define a streamlined set of internally consistent regulations specifically applicable to computer software. This would go far to alleviate the confusion faced by contractors and contracting officers alike created by the current regulatory patchwork. In developing internally consistent, comprehensive regulations, however, the rights of creators of commercially available computer software (such as copyright rights) should be carefully guarded, the Government receiving only the minimum rights necessary to perform its function. This will benefit not only contractors but also the Government, which will be freed from the administrative burden and cost of protecting proprietary interests in technical data which are not absolutely necessary for the Government to fulfill its mission.

In this regard, ADAPSO is very concerned that certain provisions of the interim rule do not serve its underlying policy goals and may even interfere with software developers' rights in commercially available software and associated documentation. Subpart 227.472-3(a)(1)(iv) in particular grants the Department unlimited rights in manuals or instructional materials which are necessary for installation, operation, maintenance, or training purposes and which are prepared for or required to be delivered under any government contract. This same entitlement is also incorporated in Subpart 252.227-7013(b)(1)(iv). These unlimited rights would allow DOD to use, duplicate, release, or disclose technical data in such manuals in any manner and for any purpose whatsoever. Moreover, the current DFAR and the interim rule appear to be identical in this regard.

DOD's usual practice in contracts for the acquisition of commercial ADPE products is to include a requirement for delivery of technical manuals which support the equipment. These manuals are developed exclusively at private expense and are protected by U.S. copyright law. Both the existing regulation and the interim rule clearly impinge on the copyright owner's rights.

This is contrary to both the expressed intent of Pub. L. 99-661 which underlies the interim rule and the philosophy of Executive Order 12591. Pub. L. 99-661 directs that the mandated technical data regulations may not impair any right of any contractor with respect to patents or copyrights. Further, the

accompanying Conference Report advises that DOD should generally seek to acquire the same rights in data that a commercial customer would be granted in acquiring the same product.

ADAPSO contends that the obvious intent of Pub. L. 99-661 should supersede a contradictory and altogether too literal interpretation of the provision regarding manuals or instructional materials. A distinction must be made between DOD's data rights to these items when prepared at private expense only and when they are prepared with full or partial Government funding. ADAPSO recommends that Subparts 227.472-2 and 252-7013 be modified to reflect this distinction in order to bring the regulations into concert with the stated acquisition policy that DOD should obtain only the minimum, essential technical data rights.

Otherwise, the definition of "computer software documentation" of Subpart 227.471, "including computer listings and printouts, in human-readable form," may be construed to include a computer program's source code, the principal asset of software developers.

Subpart 227.472-3(a)(1)(ii), which awards the Government unlimited rights in "[t]echnical data resulting directly from performance of experimental, developmental, or research work," may extend unlimited rights even in situations where a contractor or subcontractor can demonstrate that it would have developed such data even if no contract or subcontract had been awarded.

Subpart 227.473-1(b)(1)(iii) requires contracting officers to review and evaluate restrictions asserted in pre- or postaward notifications on the Government's right to use or to disclose technical data or computer software, but allows contracting officers to forego negotiations on the assertions where "negotiations are not practicable." The section does not define those situations in which negotiations would be impracticable or otherwise offer any guidance as to impracticability.

Subpart 227.473-1(b)(2)(iii) provides that where time limitations for either Government Purpose License Rights (GPLR) or limited rights are negotiated, they should normally be no less than one year nor more than five years. A two-year minimum period, however, would reflect more accurately the economic life of software technology, one of the criteria of this section, and would more closely accord with current, commercial practice.

Finally, Subpart 227.473-1(c)(2) requires that a nonGovernmental recipient of technical data subject to GPLR sign a Standard Non-disclosure Agreement provided in the regulations. The regulations are silent, however, with regard to a similar requirement for nonGovernment recipients of technical data subject to limited rights. ADAPSO is concerned that such silence could well lead to inconsistency or oversights regarding protection of this type of information.

Incorporation of the above-suggested changes and the corresponding future amendment of the DFAR Supplement on software rights will further the policy objectives of the National Defense Authorization Act (Pub. L. 100-180) as well as encourage the development of new technologies and the improvement of existing technologies.

If your office has any questions about these comments or otherwise requires ADAPSO's help, please feel free to call upon us.

Sincerely,



George T. DeBakey
Executive Director

CC: ADAPSO Policy and Regulation Subcommittee



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27 May 1988

Chairman, DAR Committee
Defense Acquisition Regulatory Council

Attn: Mr. Greg Petkoff
The Pentagon, Room 3C841
Washington, D.C. 20301-3062

Reference: DAR Case 87-303, DFARS 52.227-7013

Tektronix is a producer of commercial, state of the art, test and measurement equipment. Our commercial products are developed exclusively at private expense. I am writing this letter because Tektronix is concerned about the method the DAR Council has chosen to comply with 10 USC 2320, Rights in Technical Data.

As you know, the reference DFARS clause directs the DoD contractor to place the Limited Rights Legend on each piece of technical data supplied to the DoD that the contractor asserts falls under such rights. In addition, the Limited Rights in the interim clause also specifically requires "The number of the prime contract under which the technical data is to be delivered" to be marked on each piece of technical data.

If documentation is not so marked, it is presumed to be supplied with unlimited rights. The underlying philosophical approach appears to be that every piece of documentation which the contractor desires to protect must be specially marked.

This requirement causes considerable special review and handling of the orders from DoD. Tektronix shipped approximately 40,000 commercial instruments to the U.S. Government in the past year. Had technical documentation been required to be shipped with each instrument and had the proposed clause been included in each contract, (a possible, but unlikely event) significant additional special handling time would have had to be expended by Tektronix to effect the marking requirement. Since this requirement is special to the Government, Tektronix would look to DoD for compensation for this additional special effort. For this additional cost, no additional value would be provided to DoD.

development;^{25/} 2) the government did not need "unlimited rights;" and 3) the contractor agreed to commercialize the technology. § 227.472-7 (1987). The regulations specifically noted that the intent of the Government Purpose License was to establish the contractor's proprietary interest and therefore promote wider application and development of the relevant technology. § 227.472-5(b) (1987). In fact, the Government Purpose License represents a highly artificial effort toward achieving this goal; despite its name, it has very little in common with the licensing agreements governing the transfer of data and software in commercial settings.

A principal drawback to the Government Purpose License is that, unlike commercial licenses, it cannot be molded to accommodate varying circumstances. The regulations require that the contractual provision containing the Government Purpose License be in exact accord with the regulations' definition of a "Government Purpose License." See §252.227-7013(b)(2)(ii)(B) (1987). That definition essentially ensures that the Government will always have unlimited rights for Government purposes:

"Government purposes license rights"
means rights to use, duplicate, or disclose
technical data . . . in whole or in part and

^{25/} The revisions established Government Purpose License Rights as the norm when the contractor contributed more than half of an item's development costs. §227.472-5(b) (1987). However, even when the contractor made "substantial contributions" that did not exceed fifty percent of an item's development cost, the contracting officer was instructed to "give consideration to obtaining less than unlimited rights." Id.; § 227.472-7 (1987).

in any manner, for Government purposes only, and to have or permit others to do so for Government purposes only. Government license rights include purposes of competitive procurement but do not grant the Government the right to have or permit others to use technical data. . . ." § 227.471 (1987).^{26/}

The use of a boilerplate provision, especially such an ambiguous one, hardly seems sufficient to protect a contractor's proprietary interest or to effectuate the regulations' stated policy of providing the Government with no more data rights than are actually needed. § 227.472-5 (1987). Though the Government may not release data for commercial purposes, competitors may still gain insights into valuable trade secrets by participating in the relevant DoD program. The regulations, moreover, specifically contemplate that DoD will disseminate data subject to Government Purpose License Rights so that other contractors may prepare bids for purposes of competitive procurement and support services. § 227.471 (1987). In sum, the Government Purpose License seems little more than a cosmetic response to Congressional and Presidential concerns that contractors be permitted to retain ownership rights in data generated from mixed-funding and that DoD reconcile its rights-in-data policies with commercial practices. It is unlikely that this innovation will vindicate the rights of software developers even if it should become a feature of DoD's software acquisition :

^{26/} The Government use and possible disclosure of data pursuant to a Government Purpose License Rights is royalty-free. § 227.472-7 (1987).

regulations.

D. The 1988 Dixon Amendments. Congress reacted to the 1987 data rights revisions in the so-called "Dixon Amendments" to the National Defense Authorization Act of 1988 with an attempt to nudge DoD towards conforming its concept of licensing more closely to the commercial model.^{27/} The statute specifically endorses the idea of direct licensing,^{28/} and prohibits the Government from interfering with third-party royalties for the use of data developed exclusively at private expense.^{29/} Furthermore, DoD is given permission to

"prescrib[e] reasonable and flexible guidelines, including negotiation objectives, for the conduct of negotiations regarding the respective rights in technical data of the United States and the contractor."^{30/}

The Dixon Amendments required that DoD implement these policy changes in revised rights-in-data provisions to take effect by April 1, 1988.^{31/} However, Congress once again excluded computer software from its directive, thereby ensuring that the software rules and the rules governing other technical

^{27/} Pub.L. No. 100-180, § 808, 101 Stat. 1128 (1987) (amending 10 U.S.C. § 2320).

^{28/} Pub.L. 100-180 § 808(a)(4)(C) (amending 10 U.S.C. 2320(a)(2)(G)).

^{29/} Id. § 808(a) (amending 10 U.S.C. § 2320(a)(1)).

^{30/} Pub.L. 100-180, 101 Stat. 1128, 1130 (1987) (amending 10 U.S.C. § 2320).

^{31/} Id. § 808(c).

data would continue to diverge.

E. The Administration's Draft Policy on Rights in Technical Data. In early 1988, the Office of Federal Procurement Policy released the "Administration's Draft Policy on Rights in Technical Data," pursuant to the President's 1987 Executive Order.^{32/} The draft policy, like the Dixon Amendments, requires that rights in data be established through negotiations, and similarly recognizes that such a policy will only be successful if contracting officers are provided with the necessary guidance. Accordingly, the rule states that the Government should not obtain rights in data, regardless of the source of funding, unless it first determines that there is a specific need. Even if such a need is identified, the Government must first consider other alternatives.^{33/}

F. The 1988 Interim Rule. In response to the Dixon Amendments, DoD published an interim rights-in-data rule and request for comments on April 1, 1988. 53 Fed. Reg. 10,780

^{32/} See 49 Fed. Cont. Rep. 402 (BNA) (March 7, 1988).

^{33/} Thus, the government should not acquire data if 1) the original item or substitutes are commercially available; 2) functional data or samples of the original item will adequately serve the Government's purposes; or 3) the original contractor is willing to furnish the data through alternate sources of supply through direct licenses or nondisclosure agreements. Id. Even if obtaining the data represents the only means of assuring competitive reprocurement, the Draft Policy recognizes that acquisition of the data may nevertheless be inappropriate -- for example, when the costs of acquiring the data are likely to exceed the savings resulting from competitive reprocurement. Id. at 402-403.

(1988)^{34/} However, because the Dixon Amendments did not address computer software, DoD did not feel obliged to complete its long-awaited revision of the software rules, and it once again republished the existing provisions. In fact, the ad hoc committee formed by the DARC in 1987 to formulate new software rules has now abandoned its efforts. The explanation offered for this development is that the DARC and the Civilian Agency Acquisition Council (CAAC) plan to unify civilian and military data acquisition regulations into a single body of uniform rules by September 30, 1988. See 52 Fed. Reg. 18,140 (1987). Accordingly, DARC believes attempts to formulate rules only for the military would be a wasted effort, and the software project has consequently been turned over to a joint committee of the DARC and CAAC.

In any event, DoD's 1988 approach to data acquisitions may reveal its thinking regarding software; the interim rule could very well anticipate revisions in DoD's software acquisition policies -- if only to confirm the Department's efforts to pursue traditional objectives under the guise of reform. Thus, the April 1, 1988 revisions give the appearance of bringing DoD rights-in-data policies into line with Congressional initiatives and the OFPP draft proposals by encouraging the negotiation of data rights, while handcuffing the negotiators

^{34/} The DAR Council will consider comments received by May 31, 1988 in formulating the final rule. 53 Fed. Reg. 10,780 (1988).

with detailed guidelines and objectives. In fact, the only question typically on the negotiating table is whether the Government should take unlimited rights or Government Purpose License Rights -- with all the inadequacies discussed above. See supra pp. 14-15. See generally § 227.473-1 53 Fed. Reg. 10,783 (1988).^{35/}

The new regulations adopt the same strategy as the 1987 version, asserting broad claims to "unlimited rights" data while further expanding the authority of the contracting officer to negotiate these rights away in favor of Government Purpose License Rights. The 1988 revisions thus follow the OFPP draft policy and the 1987 Executive Order in allowing Government Purpose License Rights in data developed exclusively with Government funding. § 227.472-3(a)(1) and (2), 53 Fed. Reg. 10,783-86 (1988).^{36/} Nevertheless, the Government Purpose License is the

^{35/} Where technical data pertains to items or processes developed "exclusively at private expense," the contractor may negotiate to grant the government "limited rights," which are similar to the rights the Government receives in "restricted rights software." See §§ 227.470; 227.472-3(b); 53 Fed. Reg. 10,781; 10,783 (1988).

^{36/} The mix of Government and private funding nevertheless remains a factor in determining whether Government Purpose License Rights are appropriate. § 227.473-1(b)(2)(E), 53 Fed. Reg. 10,784 (1988). Other factors include: whether the technology can be commercialized; further acquisition strategy; and the development of alternative sources of supply. § 227.473-1(b)(2), 53 Fed. Reg. 10,784 (1988). In addition, the contracting officer is instructed to consider the "[b]urden on the Government" of protecting the contractor's rights in the technical data and may not agree to a Government Purpose License where procurement will involve a large number of potential competitors. § 227.472-3(a)(2)(ii)(A).

same limited boilerplate provision found in the 1987 regulations, and is therefore completely unsuitable as a vehicle for imparting the desired flexibility into negotiations over data rights. Far from recognizing this problem, the regulations specifically reject the use of "non-standard" license rights "unless approved by the head of the contracting activity." § 227.473-1(b)(2)(iv), 53 Fed. Reg. 10,784 (1988).

The 1988 revisions further undermine the utility of the Government Purpose License by requiring that it expire and be replaced by unlimited Government rights. § 227.472-3(a)(2), 53 Fed. Reg. 10,783 (1988). Indeed, the regulations state that the Government's negotiating objective in most situations will be to obtain unlimited rights within a one to five year period. § 227.473-1(b)(2)(ii) and (iii), 53 Fed. Reg. 10,784 (1988). This result runs counter to the OFPP draft proposal as well as DoD's own stated policy of obtaining "only the minimum essential technical data and data rights." § 227.472-2 53, Fed. Reg. 10,782 (1988). We suspect, consequently, that the interim rule will be subject to much criticism from the private sector and will probably stimulate renewed reform efforts within Congress and the Executive Branch.

V. CRITICISM OF DoD's RIGHTS-IN-DATA POLICIES

Why DoD should adhere so recalcitrantly to its present policies remains a mystery. Traditionally, DoD has maintained that competitive procurement policies require extensive government rights in data in order to evaluate future acqui-

sitions and to solicit competitive bids. This attitude blends into the more general notion that government needs for proprietary technical data and software exceed those of private commercial customers. DoD has articulated its special needs as follows:

"Millions of separate items must be acquired, operated, and maintained for defense purposes. Technical data are required for training of personnel, overhaul, and repair, cataloging, standardization, inspection and quality control, packaging and logistics operations. Technical data resulting from research and development and production contracts must be disseminated to many different users. The Government must make technical data widely available to increase competition, lower costs and provide for mobilization." 53 Fed. Reg. 10,782, § 227.472-1(a) (1988).

Nevertheless, it is difficult to believe that the exigencies of the Government's mission routinely demand unlimited rights in software and data. The better explanation for DoD policy is that the Government relies upon the expenditure of public funds as an artifice to avoid the effort that would be required by a more carefully considered assessment of DoD's needs.

Even before the Packard Commission's widely publicized criticism of DoD's rights-in-data regulations, DoD's policy of requiring extensive rights in data and software had been challenged for undercutting Governmental objectives.^{37/} To be sure,

^{37/} Also instrumental in bringing about a reassessment of DoD's policies were the considerable efforts of the Software Engineering Institute of Carnegie-Mellon University, which was funded by DoD in 1985 and given the responsibility of investigating the (Footnote Continued)

acquisitions using "unlimited rights" software may decrease the cost of maintenance and reprocurement. However, the cost of the original contract may well increase because, "if contractors know they must lose [their proprietary interests in] data when dealing with the Government, they will almost certainly seek to recoup those losses when negotiating contract prices."^{38/} Thus, a broad assertion of rights in commercially valuable information and the resulting high risk of disclosure to competitors will "drive up the cost of technology the Government buys from industry, especially computer software that is in great demand in the commercial marketplace."^{39/}

This threat to commercial proprietary interests may deprive the Government of the most desirable software. The industry representatives who composed the Rights in Data Technical Working Group of the Institute for Defense Analysis (RDTWG) observed:

"Industry is reluctant to invest in new

results of DoD's approach to software acquisition. See, e.g., Martin and Deasy, The Basis for Reconciling Department of Defense and Industry Needs for Rights in Software (Vol. I of the Software Engineering Institute Report, Seeking the Balance Between Government and Industry Interests in Software Acquisitions) (SEI-87-TR-13 June 1987); Samuelson, Toward a Reform of the Defense Department Software Acquisition Policy (CMU/SEI-86-TRI April 1986); Commercial Models, supra note 3.

^{38/} OSD Data Rights Study Group, Who Should Own Data Rights: Government or Industry? Seeking a Balance at 16 (June 22, 1984) (unpublished report).

^{39/} Arthurs, Contractors Fume as Air Force Takes Off After Rights to Data, Legal Times of Washington, Feb. 27, 1984, at 8, col. 4.

technology for the government because [of] sweeping data rights demands by the government, and apprehensiveness about the loss of proprietary information. . . . This creates a climate unfavorable to the transfer of such technology [to the government]."^{40/}

The result of this hostile environment, RDTWG concluded, is that:

"the government is failing to obtain the most innovative and creative computer software technology from its software suppliers. Thus, the government has been unable to take full advantage of the significant American lead in software technology for the upgrading of its mission-critical computer resources."^{41/}

DoD's rights-in-data provisions must also be judged against civilian procurement policies. Each civilian agency promulgated its own data acquisitions provisions until the Small Business & Federal Procurement Competition Enhancement Act of 1984 mandated a revision of the FAR to establish uniform rules governing data rights.^{42/} These rules became effective on June 1, 1987, and, in contrast to the DoD regulations, adopt a strategy of limiting data delivery requirements.^{43/} For example, a contractor may withhold "restricted computer software" from the Government by substituting "form, fit and function data" in its

^{40/} Rights in Data Technical Working Group, Draft Final Report sections 2-3 (Nov. 22, 1983).

^{41/} Id. § 1-1.

^{42/} Pub.L. 98-577, § 301, 98 Stat. 3074 (1984).

^{43/} The proposed FAR rights-in-data provisions were first issued for comment on August 5, 1985, see 50 Fed. Reg. 32,870 (1985), but were not published in final form until May 13, 1987. 52 Fed. Reg. 18,140 (1987).

place. 48 C.F.R. § 27.404(b).^{44/} Restricting Government acquisitions to such functional data allows continued operation and maintenance of Government systems while, at the same time, reduces the risk that a competitor will obtain the additional information necessary to the reproduction of protected intellectual property.^{45/} Though the FAR only allows the substitution of functional data for privately-developed software and data, it is easy to see how this strategy might be extended to better effectuate administration policies of limiting data acquisitions to the necessary minimum.

Indeed, because of OFPP's directive that the CAAC and DARC promulgate uniform data acquisition rules for the civilian and military agencies, DoD may come under considerable pressure to adopt a similar approach. In the absence of a direct Congressional mandate, however, disagreement over such a fundamental point will probably stand in the way of unified regulations.

^{44/} "Form, fit, and function data" for computer software is defined as "data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements," but does not include "the source code, algorithm, process, formulae, and flow charts of the software." 48 C.F.R. § 27.401. The Government may request the actual software when necessary. 48 C.F.C. § 27.404(b).

^{45/} Under the FAR, a contractor may qualify privately-developed software for "restricted rights" status simply by adopting the procedures that would be necessary to preserve its intellectual property rights in an ordinary commercial setting. § 27.401.

VI. ANTICIPATED REFORMS

DoD's reluctance to heed Congressional and Executive calls for reform will undoubtedly lead to further initiatives to push DoD further in the direction of a licensing scheme that more closely corresponds to commercial practices. Ideally, renewed calls for case-by-case negotiation will result in software acquisition licenses that are carefully tailored to an individualized analysis of DoD's needs with respect to particular software and the developer's particular interests in retaining proprietary rights in that software. These arrangements are the norm in private industry and would permit DoD to obtain what it needs, but to pay for no more than it needs -- while at the same time allowing industry to protect its most innovative and proprietary data.^{46/}

Given existing resources, however, the wholesale adoption of such a scheme may initially be administratively unworkable.^{47/} DoD has expressly disapproved of nonstandard licensing arrangements and has warned of the "serious administrative burdens for contract support personnel and persons in industry who may be required to handle this data many years after the contract [is complete]."^{48/} As a first step, DoD might

^{46/} See Commercial Models, supra note 3 at 7.

^{47/} See 2 Nash & Cibinic Rep. paragraph 19, at 48 (March 1988).

^{48/} DoD Strawman Approach for New Technical Data, § 227.473-2. Inside the Pentagon 13 (January 22, 1988).

adopt a series of generic licenses, which respond to specific Government needs -- such as standardization, maintenance, or reprocurment -- but which are drafted far more tightly than the dubious "Government Purpose License."^{49/} Royalties would reflect the scope of the rights obtained under the license and the extent to which the software was generated by public financing. As contracting officers gain the necessary experience, they could gradually be afforded the latitude to deviate from this framework in favor of the more individualized approach discussed above.

Finally, Congress will no doubt make further attempts to reconcile DoD to the use of "direct licensing," a practice which will help transform the Government Purpose License into a more useful concept. Under this scheme, the Government could direct the licensor to enter into a licensing agreement with a designated third party if the Government deemed it necessary to disclose the software or data. As one commentary has noted, the use of direct licensing would allow "a contractor to make a business decision regarding the licensee and give[] the contractor direct control over enforcement through privity of contract."^{50/} DoD has been traditionally fearful that contractors would demand unreasonable conditions if allowed to

^{49/} See Commercial Models, supra note 3 at 7. Flexibility still should be permitted for unusual situations not addressed by the standard clauses. Id.

^{50/} OSD Study Group, supra note 36 at 21-22.

negotiate directly with third-parties.^{51/} However, the Government contract could protect the interests of the Government by specifying the royalty and other terms of any private license that the Government might require.^{52/}

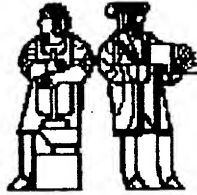
VII. CONCLUSION

DoD has labored unsuccessfully to accommodate its software rules to the framework of its current acquisition policy for other technical data. In fact, such an accommodation is impossible. The economics of the software industry simply do not comport with a procurement strategy that places vital proprietary interests at risk by a constant demand for unlimited rights.

Software differs from other data in the quality and quantity of the information it embodies; a competitor who gains access to this information not only usurps the value of the software itself, but also appropriates trade secrets that may represent a significant portion of the developing firm's market value. Indeed, even in the context of more enlightened policies, software should receive more extensive protections than other technical data. Those companies engaged in developing first-rate software should give strong support to Congressional and Executive Branch efforts to have DoD adopt a licensing scheme that is more closely attuned to a software developer's concerns.

^{51/} Taylor & Burgett, supra note 5 at 8.

^{52/} Greenberger, supra note 6 at 35.



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May 25, 1988

Mr. Charles W. Lloyd, Executive Secretary
DDASD(P)DARS, c/o OASD(PL)(MRS)
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Washington, D.C. 20301-3062

Ref: DAR Case 87-303

Dear Mr. Lloyd,

The Massachusetts Institute of Technology wishes to submit the following comments with respect to the interim rule published at 53 FR 10780 under the DFARS Subpart 227.4 - Technical Data, Other Data, Computer Software, and Copyrights, and the clause at 227.252-7013.

It is our experience that P.L. 96-517, and the amendments of P.L. 98-620, have stimulated much stronger research relationships with industry and have encouraged the expansion of Institute activities directed toward the transfer of MIT generated technology.

It has become increasingly obvious, however, that the effective transfer of university generated technology requires dealing simultaneously not only with patentable inventions but also with technical data and software involving property rights other than patents.

For example, MIT has been working on nuclear magnetic resonance imaging devices which require a sophisticated and integrated hardware and software system; on symbolic processing, the backbone of artificial intelligence technology, which consists of a combined hardware and software system which allows computers to simulate human problem

solving and data processing techniques; and integrated circuits, which may involve a copyrightable, pattern-generating software program, a chip design copyright under the Semiconductor Chip Protection Act of 1984, a patent on the novel functions performed by the integrated circuit, and possibly a trademark.

The effective transfer of such technology requires a Federal policy for technical data and software which parallels that for patentable inventions. At the present time, however, Federal policy inhibits the effective transfer of many technologies which combine inventions, technical data, and software.

The interim rule would continue for DOD those features of current Federal policy which discourage U.S. companies from commercializing technologies resulting from Federally funded university research.

The revisions required so that the interim rule will, instead, provide an incentive for commercialization can easily be accommodated within the existing structure of the rule. Our specific recommendations are set forth below.

A. ACQUISITION POLICY.

The general acquisition policy set forth in Part 227.472-1 of the interim rule makes no mention of the role of universities in the dissemination of research results and transfer of technology.

Recommendation: That this part be modified to recognize that the obligations of the government with respect to the dissemination of research results can be fulfilled through technology transfer programs conducted by contractors.

B. UNLIMITED GOVERNMENT RIGHTS

Under the interim rule, the government acquires unlimited rights to technical data and to computer software generated in the course of a contract whether or not the data or software pertains to parts, components or processes needed for procurement; whether or not the government has a need for it; and whether or not it has been specified for delivery.

The existence of such broadly stated unlimited rights in the government, whether or not exercised, seriously inhibits the contractor's ability to effectively transfer technical data and software to the commercial sector. Our views are essentially the same as those expressed by Federal laboratory officials as reported in the GAO study "Technology Transfer - Constraints Perceived by Federal Laboratories and Agency Officials" (GAO/RCED-88-116BR), which was issued in March 1988.

Recommendation - Technical data: That the clause at 252.227-7013 under (b)(1), Unlimited Rights, (and in the text at 227.472-3 (a)(1)), be revised to provide that the government acquires unlimited rights under (i) only where the contracting officer has identified a specific need for the data which cannot be met through other means, and under (ii) only where delivery of the data has been specified as an element of performance.

Recommendation - Computer software: That the clause at 252.227-7013, under (c)(2), Unlimited Rights, be revised to provide that the Government acquires unlimited rights under (i) and (ii) only where delivery of such software is specified as an element of performance.

C. GOVERNMENT PURPOSE LICENSE RIGHTS IN TECHNICAL DATA

Subparagraph 227.472-3(a)(2) of the interim rule provides an exception to unlimited Government rights so that the Government may agree to accept Government Purpose License Rights in order to "encourage commercial utilization of technologies developed under Government contracts..."

This exception is not available, however, where the "(B) Technical data must be published (e.g., to disclose the results of research and development efforts." This appears to regress from the philosophy reflected in the rule published at 52 FR 12390 on April 16, 1987. That rule provided in subpart 9227.472-5(b) that, in cases of mixed funding, unless the contracting officer determines during the identification of needs process that unlimited rights are required, the Government will accept Government Purpose License Rights if ".....the contractor is a small business firm or nonprofit organization that agrees to commercialize the technology."

The interim rule can easily be interpreted as a specific constraint on the ability of universities and other contractors to transfer technology generated in the course of basic and applied research programs.

Recommendation: That 227.472-3(a)(2)(ii)(B) be omitted and a new section added which provides that the contracting officer shall agree to accept GPLR when the contractor is a small business or non-profit organization which agrees to commercialize the technology, except where unlimited rights are required for the purposes of competitive procurement of supplies or services, .

D. GOVERNMENT ACQUISITION OF RESTRICTED RIGHTS IN COMPUTER SOFTWARE

As noted above, the effective dissemination of software by those who created it requires the same policies as patents, but unlimited government rights have inhibited such dissemination and commercialization.

Recommendation: In the clause at 252.227-7013, revise (c)(1) by adding a new subparagraph (c)(iii) providing that the contracting officer shall agree to accept restricted rights when the contractor is a small business or non-profit organization which agrees to commercialize the technology unless unlimited rights are required for the purposes of competitive procurement of supplies or services.

E. NEGOTIATION FACTORS

It is quite likely that university research will frequently involve mixed funding. More specific guidance should, therefore, be provided with respect to the negotiation of government-university rights in technical data and computer software.

Recommendation: That a new subparagraph (D) be added to (b)(2)(ii) to provide that when the government does not have a need to use the data for competition and the contractor is a university or other nonprofit which is interested in commercializing the data, the government will negotiate Government Purpose License Rights.

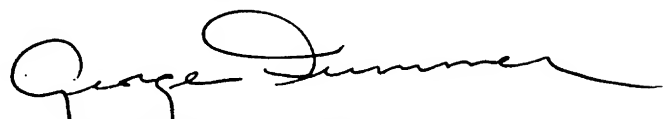
F. THE SBIR PROGRAM - AN ALTERNATIVE

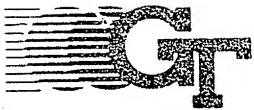
We believe that in contracts for basic or applied research, Alternate II of the clause at 252.227-7013, which is mandated by statute for the SBIR Program, would be an appropriate alternative to the recommendations set forth above.

Recommendation: That substitute paragraphs (b) and (c) of Alternate II to the clause at 252.227-7013, be stipulated for inclusion in all contracts awarded to non-profit organizations for the conduct of basic or applied research, which do not require the delivery of technical data or computer software needed by the Government for the competitive procurement of items, components, or processes.

We appreciate the opportunity to comment on the interim rule. The transfer of technology resulting from research funded by the Federal agencies and by U.S. industry is an important and expanding activity at MIT and other universities. DOD is in a position to adopt a policy with respect to technical data and software which will significantly and substantially enhance this effort. We urge you to do so.

Sincerely,


George H. Dummer
Director



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May 30, 1988

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Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Ref: DAR Case 87-303

Dear Mr. Lloyd:

This letter is submitted in support of the position of the Council on Governmental Relations (COGR) in their 11 May 1988 letter on the above referenced matter. Georgia Tech, as both a major research university in the area of information technology and developer of computer software which has been successfully commercialized, urges the implementation of a Federal policy on computer software and data which parallels that contained in Public Law 96-517. P.L. 96-517 has facilitated stronger research relationships between research and industry. This benefit should be expanded across the broad spectrum of intellectual property.

As was pointed out in testimony given by M.I.T.'s George H. Dummer on 30 April 1987 before the U. S. House of Representatives Committee on Science, Space and Technology, Subcommittee on Science, Research and Technology, the effective transfer of university generated technology requires the consideration of different (trade secret, patent, copyright) intellectual property rights. Technology can no longer be cleanly categorized as only having one kind of right subsisting within it.

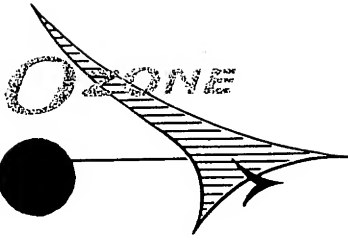
Georgia Tech is one of many universities facing this issue. The technology developed in university laboratories under Federal sponsorship comprises only the starting point for technological innovations which are a necessary part of our maintaining our position in the worldwide scientific community. A progressive, consistent set of Federal policies in the area of intellectual property ownership and rights would have a positive effect which would benefit not only universities, but the nation as well.

We would be pleased to provide additional information at your convenience.

Sincerely,
Georgia Institute of Technology

J. W. Dees, Director
Office of Contract Administration

cc: Milt Goldberg, Executive Director
of COGR



OZONE INDUSTRIES, INC.

101-32 101st STREET • OZONE PARK, N. Y. 11416 • (718) 845-5200

25 May 1988
PR88-2627

Defense Acquisition Regulatory Council
ODASP (P) DARs, c/o OASD (P&L) (MRS)
DAR CASE 87-303
THE PENTAGON
WASHINGTON, DC 20301-3062

Attention: Mr. Charles W. Lloyd,
Executive Secretary

Subject: New Interim Dod Data Rights Regulations
(effective 4/4/88)

Dear Mr. Lloyd:

Ozone Industries endorses the comments submitted by PIA
on the subject regulations.

Very truly yours,

OZONE INDUSTRIES, INC.


J.F. Ceccarelli
President

JFC/ebs



North Carolina State University

Office of the Vice Chancellor for Research
Research Administration

Box 7003
Raleigh, N.C. 27695-7003
(919) 737-2117
TELEFAX: (919) 737-3773

May 30, 1988

Mr. Charles W. Lloyd
Executive Secretary
ODASD(P)DARS
c/o OASD(PL) (MRS)
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Ref. DAR Case 87-303

Dear Mr. Lloyd:

North Carolina State University hereby submits the following comments with respect to the interim rules published at 53 FR 10780 under the DFARS Subpart 227.4 - Technical Data, Other Data, Computer Software, and Copyrights, in support of the positions taken in the letter written to you by Milton Goldberg, Executive Director of COGR, dated May 11, 1988.

In our opinion, adoption of the interim rule as proposed by the Department of Defense will continue the negative impact on successful technology transfer already felt as the result of the DOD, DOE and NASA Rights in Technical Data and Computer Software regulations implemented by those agencies while awaiting finalization of FAR Subpart 27.4. By failing to reconcile the government's rights in technical data and computer software with the changes in the Federal patent policy which occurred in 1980, the agencies have neglected to recognize that technology now emerging from the universities has progressed beyond the stage of individual concept development. Now, more often than not, University research generates discoveries which deal in multiple areas of intellectual property rights and are developed over a significant period of time. In many instances discoveries must be combined into a single package and transferred as a unit if they are to be of value in the technology race.

While it is this new level of sophistication that makes Federal funding of university research a priority if the United States is to retain its position as a world leader in the advancing technologies, the fruits of university/government collaboration will not benefit the citizens of the United States as long as government procurement regulations serve as a disincentive to effective technology transfer.

By way of example, North Carolina State University is currently negotiating with a start-up company to further develop a CAD/CAM System for the design and manufacture of Custom/Orthopaedic shoes.

Mr. Charles W. Lloyd
May 30, 1988
Page 2

The project was initially begun with funding from the Veteran's Administration administered through NASA. While several hundred thousand dollars have already been spent on the project by the Federal government, there is insufficient Federal funding to complete the work. A start-up company has agreed to commit in excess of one-half million dollars to finish the project if it can be assured of securing adequate rights to ensure that it will be able to commercialize the CAD/CAM Footwear System with some reasonable expectation of recouping its R&D investment as well as realizing some profit for its investors. When finished, the System will combine expert system software, applications software, technical data by way of designs, and patented hardware.

While the University can guarantee the start-up company an exclusive position with regard to patents as a result of Public Laws 96-517 and 98-620, we cannot give the company any assurances with respect to the technical data and computer software developed with Federal funding due to the unlimited rights guaranteed to the Federal government under agency regulations. Both this University and the start-up company have encountered significant frustration in trying to resolve these issues with the agencies in an effort to avoid abandoning the project. While this University stands to lose funding for a project it would like to see completed from the standpoint of education and research, the general public stands to lose a much-needed technology, the effective use of public money, and an opportunity to see a new company develop.

While subparagraph 227.472-3(a)(2) of the interim rule goes part way in resolving conflicts similar to the one described by providing a vehicle to limit Government rights through application of the Government Purpose License Rights, the exception under (2)(ii)(B) operates to defeat the purpose of the GPLR exception. In order to cure this obvious defect, and to provide the universities with a reasonable opportunity to transfer, for commercial use, both technical data and computer software which is not necessary to competitive government procurement, this University strongly urges the acceptance of COGR Recommendations 6 through 8 on pages four, five and six of Mr. Goldberg's letter. In the alternative, we join in endorsing COGR's Recommendation 9 to provide for a new section 227.483 to be added to the SBIR Program regulations or for modification of existing Section 227.479 to include university research programs.

Thank you for allowing us this opportunity to comment.

Very truly yours,



Franklin D. Hart
Vice Chancellor for Research



International Business Machines Corporation

6705 ROCKLEDGE DRIVE
BETHESDA, MARYLAND 20817

May 31, 1988

Defense Acquisition Regulatory
Council
ODASD (P) DARS
C/O OASD (P&L) (MRS)
Room 3D139
The Pentagon
Washington, DC 20301-3062

Attention: Mr. Charles W. Lloyd
Executive Secretary

Reference: DAR Case 87-303

Dear Mr. Lloyd:

The International Business Machines Corporation (IBM) is pleased to respond to your request for comment concerning the interim changes to Subpart 227.4 and Part 252 of the Defense Federal Acquisition Regulation Supplement (DFARS). We are also participating with CODSIA and ADAPSO in formulating their responses. However, we wish to address the following issue directly as it is of primary importance in the sale of commercial ADPE products.

IBM's comment concerns Subpart 227.472-3(b)(1) "Limited Rights" which requires Technical Data in the form of privately funded, commercially available "Manuals or Instructional Materials for installation, operation, maintenance or training purposes" to be provided with Unlimited Rights per Subpart 227.472-3(a)(iv).

IBM notes that the Subpart, which is identical to previous versions of the Regulations, clearly impinges on the copyright existing in such documentation and is inconsistent with the legislative intent for the Interim Regulations.

This impingement on an owner's copyright in such documentation is contrary to the expressed intent of the recent statute, PL99-661, which underlies this Regulation, as well as the philosophy of Executive Order 12591. PL99-661 directs that the mandated Technical Data Regulation not impair any right of any contractor with respect to patents or copyrights. Furthermore, the accompanying legislative conference report advises that the Department of Defense should generally seek to acquire the same rights in data that a commercial customer would be granted in acquiring the same products.

1469-88/1A/AC

Mr. Charles W. Lloyd
Page -2-
May 31, 1988

IBM further notes that the subpart treats such documentation differently than similar documentation related to commercial computer software which is treated in Subpart 227.481(a)(f). The former provides a "Unlimited Rights" classification to such documentation, whereas the latter provides a "Restricted Rights" classification.

This difference in treatment was considered in a study authorized by DOD and conducted by the Software Engineering Institute of the Carnegie-Mellon University. The study is described in a technical report published by Carnegie-Mellon University, entitled "Proposal for a New 'Rights in Software' Clause for Software Acquisitions by the Department of Defense", by Pamela Samuelson, et al., dated September 1986. The study states that privately funded documentation should not be subjected to Limited Rights, but should be subject to the same restriction as commercial documentation related to software which receives Restricted Rights. To do otherwise causes confusion and deters many firms from selling rights in their valuable technology to DOD.

IBM submits that (1) the intent of Congress should supersede a contradictory and too literal interpretation of its provisions concerning Manuals or Instructional Materials, and (2) there is no substantive reason for different treatment as between documentation related to software and other documentation when both are commercially available.

Accordingly, IBM recommends, for the reasons indicated above, that Subpart 227.472-2(a)(iv) be changed, as follows, to treat in the same manner as documentation provided under Subpart 227.481(a)(f):

In line 2, after "data" insert -- "or privately funded, commercially available data."

Likewise, a similar insertion should be made in Part 252.227-7013(b)(1)(iv); Alternate II (April 1988), and as otherwise required in the Regulations so as to be consistent with Subpart 227.472-2(a)(iv) as modified above.

This change should bring the Regulation into concert with the stated acquisition policy that the Department of Defense should obtain the same rights in data that a commercial customer would be granted in acquiring the same products.

Please accept my appreciation for the opportunity to provide you with IBM's views with respect to the Interim Regulations.

Sincerely,



Bruce E. Leinster
Federal Systems Contracts Manager

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS (CODSIA)

1620 Eye Street, N.W., Suite 1000
WASHINGTON, D.C. 20006

(202) 659-5013

June 2, 1988
DAR Case 87-303
CODSIA Case 3-85

Mr. Charles Lloyd
Executive Director
Defense Acquisition Regulatory Council
OASD(P&L)DASD(P)DARS
c/o Room 3D139 The Pentagon
Washington, D. C. 20301-3062

Dear Mr. Lloyd:

On April 1, 1988, the Defense Acquisition Regulatory Council issued, as an interim rule, regulations covering rights in technical data and requested comments on these regulations. The undersigned associations are pleased to provide our principal objections which are summarized below and illustrated in an attachment to this letter. Detailed comments, including other major areas of concern, will be provided under separate cover.

In general, we note that the April 1988 interim regulations, as did the May 1987 regulations, fail in several areas to incorporate explicit statutory language which is needed to provide clear policy and regulatory direction to contracting officers. In some areas, the regulations clearly repudiate Congressional direction and intent. In still other areas, while the regulations purport to follow the law or the President's Executive Order 12591, they do not. In our view, the DAR Council has failed again, significantly, to approach these data rights issues from the Congressionally-mandated perspective of balancing both the government's and the contractors' interest. Rather, we believe that this interim rule is an effort to interpret statutory language which perpetuates prior flawed data regulations and DoD preferences.

The introductory statements at 227.472-1 (relating to the general acquisition policy for technical data) and at 227.472-2 (relating to establishing minimum government needs) purport to provide a "balance of

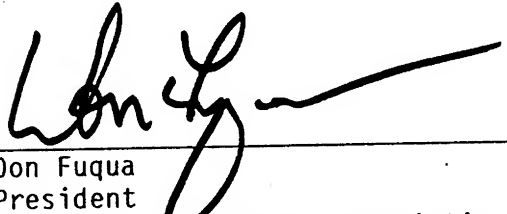
interests" policy. However, the regulations which follow fail to implement this policy, and often conflict with it. The following examples illustrate this:

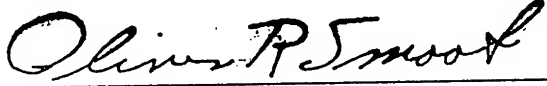
- a) The language at 227.472-1(c)(3) emphasizes that a principal reason to avoid acquisition of unnecessary technical data is that such acquisition is burdensome for the government, without adequately addressing the contractor's rights;
- b) The regulation does not differentiate adequately between the acquisition of data and rights in data acquired and therefore does not provide clear guidance to either the government or its contractors;
- c) The regulations impose excessive and burdensome paperwork and reporting requirements, far beyond the government's legitimate need for information or the expected utilization of data with other than unlimited rights;
- d) The certification and data requirements of the regulations are effective immediately even though contractors and subcontractors have not heretofore collected and maintained data for data rights purposes in that form and contracting officers are not able to negotiate alternatives;
- e) The sanctions for failing to comply with the prescribed procedures could mean the invalidation of data rights - a penalty prohibited by the statute;
- f) The regulations relegate commercial rights to a secondary issue, yet the President's Executive Order encourages such commercialization for items developed under federal contracts;
- g) The regulations foster tensions between the government and its primes, and between primes and subcontractors and will encourage litigation and confrontation rather than facilitate negotiation of rights in data.

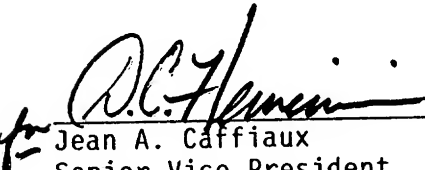
We understand that the Proprietary Industries Association (PIA) has submitted detailed comments on this regulation. We have discussed their comments with PIA and generally support their concerns and recommendations.

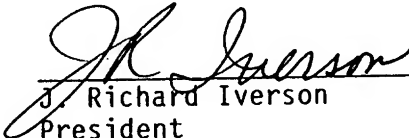
In summary, the DAR Council should withdraw the April 1 regulations and substantially re-write them to bring them into compliance with the law and the President's Executive Order. We look forward to meeting with the Council at the earliest opportunity to review in detail our concerns and with the interim regulations.

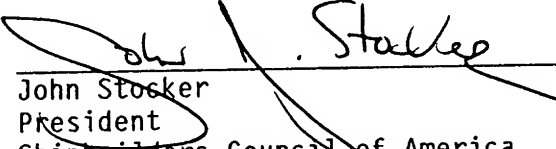
Sincerely,

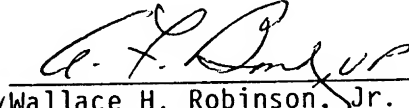

Don Fuqua
President
Aerospace Industries Association


Oliver R. Smoot
Executive Vice President
Computer and Business Equipment
Manufacturers Association


Jean A. Caffiaux
Senior Vice President
Electronic Industries Association


Richard Iverson
President
American Electronics Association


John Stocker
President
Shipbuilders Council of America


Wallace H. Robinson, Jr.
President
National Security Industrial
Association

Attachment

CODSIA'S MAJOR OBJECTIONS
TO THE
DoD INTERIM TECHNICAL DATA REGULATIONS

1. The definitions of "Developed Exclusively at Private Expense" and "Required as an Element of Performance Under a Government Contract or Subcontract", when read together, create substantial uncertainty as to what is intended to be Limited Rights data. Further, the definitions could result in demands by the Government for data rights protected by statute. The definitions introduce an issue concerning work implicitly required by a Government contract versus work that is expressly specified in the contract. The phrase "or that the development was necessary for performance of a Government contract or subcontract" is particularly expansive, subject to multiple interpretations, and must be deleted. The Government should only get unlimited rights in technical data resulting from direct and expressly required development of items, components or processes. Actually, and as noted in the conference report accompanying the Defense Acquisition Improvement Act of 1986, the Government should acquire only the same rights in data that a commercial customer would acquire in purchasing the same product.
2. The certification requirements are not limited to data to be delivered under the contract and are tantamount to acceleration of the validation process. This will precipitate an untimely and costly effort. Particularly, the "Certification of Development of Technology with Private Funding" will require the collection of voluminous supporting data (possibly equivalent to the hundreds of thousands of pages usually required to support cost and pricing data on complex products). There is no demonstrated need for such detail prior to an award of a contract. All that is needed prior to award or until data rights are challenged by the Government should be a notice of intended use and a list of asserted private expense data. When questions about a contractor/subcontractor claim of rights in submitted data arise, they can be settled through the validation process of the regulation with far less burden to all parties. The certification procedures should be deleted in their entirety.
3. Direct licensing should be affirmatively provided as a less intrusive, and often preferred, alternative to the government acquisition of technical data and/or to the acquisition of data with rights greater than Limited Rights. The failure to include direct licensing in the regulations ignores 10 USC 2320(a)(2)(G)(iii) and the Packard Commission Report. Direct licensing would provide an industry practice proven to be a cost-effective method of broadening the industrial base and ensuring alternative sources of supply.

4. The regulation requires that all data which is to be provided to the Government with less than unlimited rights must be identified in a contract list (paragraph (k) of the clause at 252.277-7013). A contractor's omission of limited rights data from this list, even though inadvertent, could result in automatic loss of rights. The previous regulations provided for government acceptance of a contractor's notice of limited rights technical data when such became known and did not require a specific listing. The interim regulation should be revised to reinstate this workable procedure. Without such amendment or revision, the burden of contract renegotiation, for example, will be required every time a subcontractor is engaged.
5. The regulations omit authority for marking restrictive legends on contractor/subcontractor technical data resulting from experimental, developmental, or research work performed at private expense and unrelated to "developed" items, components or processes. A provision comparable to 227.472-3(a)(1)(ii) for Federally funded data is required to correct this inequity and achieve a balance between Government and contractor rights.
6. The May 1987 version of the clause at 52.227-7035, "Pre-Notification of Rights in Technical Data", required offerors to identify items developed at private expense which they intended to deliver under a resultant contract. This clause has now been broadened significantly to: a) require notification with respect to items, components or processes which the offeror proposes to use in performance; b) include potential subcontractors; c) cover items, components, etc., developed (i) at private expense, (ii) with mixed funding, or (iii) government expense; and d) require notification of the offeror's contribution in mixed funding situations. This is unnecessarily broad and would be extremely costly to administer. Furthermore, it is not feasible to provide such identification at the time of proposal response. The May 1987 provision should be reinstated.
7. The time periods for expiration of limited rights which were authorized (as negotiation objectives) under 10 USC 2320 provide for subsequent use of technical data only for U.S. Government purposes, not unlimited rights as now provided by 227.472-3(a)(2)(i) of the interim regulation. Since there is not a statutory prescribed time limit for Government Purpose License Rights nor a statutory requirement dictating that there always be a time limit on limited rights, the regulation and policy of the interim rule must be changed to reflect the flexibility provided by statute.
8. To the extent that a standard non-disclosure agreement is provided in the regulations, the agreement should be between the recipient and the contractor and should be consistent with commercial practices, allowing for exceptions such as public domain information, etc.

9. The certification and marking procedures under the regulations, should they remain in some form, must be changed so that the Government negotiates rights directly with the contractor/subcontractor asserting such rights in the technical data. The law could not be more clear on this point. Contractors/subcontractors should have the right of appeal under the Disputes Act for adverse data rights decisions as they do in validation procedures.
10. Under the definition of "Developed Exclusively at Private Expense", the regulations state that IR&D/B&P are private expense. However, the next sentence states that "all indirect costs" (which would include IR&D/B&P) are considered government funds when development was required as an element of performance. This lead-in must be changed to "other indirect costs" to eliminate any ambiguity in construction and to preserve the statutory recognition of IR&D/B&P as "private expense."
11. The word "only" should be inserted in clause 252.227-7031, Data Requirements", to conform to the policy stated at 227.475-1(b), and to ensure that the CDRL and FAR/DFARS are the only sources for data requirements.
12. The definition of "unpublished" should apply to all technical data delivered to the Government, not just to data delivered with other than unlimited rights. Delivery to the Government, by itself, does not constitute publication or release to the public. If it did, delivery of unlimited rights technical data would place the contractor in automatic violation of security regulations with respect to classified information and in violation of law for ITAR controlled data.
13. 10 USC 2320(a)(i) provides that the regulations shall not "impair the rights of any contractor with respect to patents or copyrights or any other rights in technical data established by law." This statutory provision has been omitted from the listing of prohibitions under 227.473-2. Further, the regulations specifically impair the contractor's copyright interest by granting the government a license in the copyrights.
14. As drafted, the "Special Works" clause at 252.227-7020 permits the government to acquire title in technical data as opposed to specific data rights where no Special Work is involved. The regulations dealing with "Special Works" should not be used to obtain ownership or control of technical data in and of itself, but merely ownership or control of the document produced as a special work. The categories of rights in technical data that the Government acquires are established by 227.472-3.



**Aerospace
Industries
Association**

87-303

LeRoy J. Haugh
Vice President
Procurement and Finance
371-8520

May 10, 1988

Mr. Duncan Holaday
Director, Defense Acquisition
Regulatory Council
OASD(P&L)DASD(P)DARS
c/o 3D139 The Pentagon
Washington, D. C. 20301-3062

Dear Duncan:

On behalf of the AIA Intellectual Property Committee, I sincerely appreciate your participation in our Joint Session on April 19.

The members of the Committee recognize the difficult task you have in achieving uniformity among the military departments in the matter of data rights and certainly appreciate the effort that has gone into the interim regulation which was promulgated on April 1. While I am sure we will continue to have our differences with respect to parts of the regulation, I hope we can continue to work together constructively towards ultimately achieving the balancing of interests that Congress has directed and also a single government-wide regulation on this subject. Again, we very much appreciate your taking the time to be with us and your willingness to discuss candidly DoD's plans.

Sincerely,

LeRoy J. Haugh
Vice President
Procurement and Finance



**Aerospace
Industries
Association**

LeRoy J. Haugh
Vice President
Procurement and Finance
371-8520

March 18, 1988

Mr. Duncan Holaday
Director, Defense Acquisition Regulatory
Council
OASD(P&L)/DASD(P)DARS
c/o 3D139 The Pentagon
Washington, D. C. 20301-3062

Dear Duncan:

On behalf of the Aerospace Industries Association's Intellectual Property Committee and its Chairman, Bob Walker, I sincerely appreciate your acceptance of an invitation to participate in the Joint Government/Industry Session of the annual meeting of the Committee to be held in Baltimore, Maryland.

The meeting, which will be held on April 19, 1988 at the Omni International Hotel, will convene at 9:00 a.m., recess by 5:00 p.m. and includes a luncheon. A reception and dinner will be held on the evening of April 19, at 6:30 to which all attendees, participants and their guests are invited. An informal reception will also be held on the evening of April 18 from 6:00 to 7:00, to which you are cordially invited.

The Joint Session is informal, as are any presentations. Past experience indicates that both government and industry participants benefit greatly from the opportunity to meet and discuss problem areas of mutual concern.

Attached is a tentative schedule for the Joint Session, a list of expected government participants and a hotel reservation form, which should be returned to the Omni Hotel no later than March 25, 1988.

Should you desire further information, please contact me or Ruth Hall at 202/371-8520.

Sincerely,

LeRoy J. Haugh
Vice President
Procurement and Finance

Attachments

TENTATIVE AGENDA
AIA INTELLECTUAL PROPERTY COMMITTEE MEETING
April 19, 1988
Baltimore, Maryland

GOVERNMENT/INDUSTRY PARTICIPATION DAY

8:00 a.m. Continental Breakfast

9:00 a.m. Welcome Chairman Robert Walker

- 9:05 a.m. 1. Joe Allen, Department of Commerce
"Latest Developments in Federal Technology"
2. Al Solga, Department of Commerce
"Export Controls"

10:00 a.m. Coffee Break

10:15 a.m. Panel on Intellectual Property Policy
Duncan Holaday, Director, DAR Council
Steve Mourningham (DoE), representing the Civil
Agency Acquisition Council
Pamela Samuelson, University of Pittsburgh
Law School, representing the Software Engineering Institute
Nancy Wentzler, Office of Federal Procurement Policy
A wide ranging review and discussion of policy questions and pending
regulations. E.g., the Dixon Amendment on data rights - What's next?
What's ahead in software coverage? Prospects for a single Government
policy? A single regulation?

12 Noon Reception

12:30 p.m. Luncheon

Speaker: Michael Kirk, Assistant Commissioner for External
Affairs, Office of Legislation and
International Affairs, U.S. Patent Office

An update on data rights in the GATT agreement

2:00 p.m. Legislative update (Congressional Staff participants yet to
be confirmed)

2:30 p.m. Military Departments' Views on Rights in Technical Data
and Computer Software

Air Force - Participants to be confirmed

Navy - Linda Greene, Navy Policy Member, DAR Council

Mary Sullivan, Navy Legal Member, DAR Council

Army - John Conklin, Army Policy Member, DAR Council

Robert Gibson, Asst. Command Counsel, Intellectual
Property Law, AMC

NASA - Robert F. Kempf, Associate General Counsel (Intellectual
Property)

What are the peculiar needs of the Military Departments (and Major
Commands) that make uniform implementation such an elusive goal?

5:00 p.m. Adjournment

6:30 p.m. Reception - Dinner

Expected Government Guests
AIA Intellectual Property Committee Meeting
April 19, 1988
Baltimore MD

Dr. Nancy Wentzler
Deputy Associate Administrator
Office of Federal Procurement Policy

Ms. Mary Sullivan
Office of General Counsel
Department of the Navy

Mr. Robert Kempf
Associate General Counsel (Intellectual Property)
NASA Headquarters

Mr. William C. Garvert
Deputy Counsel, Navy Intellectual Property Policy
Office of the Chief of Naval Research

Mr. W. B. Montalto
Procurement Policy Counsel
Senate Committee on Small Business

Mr. Duncan Holaday
Director, Defense Acquisition Regulatory Council
OASD(P&L)DASD(P)DARS

Mr. Richard Summerour
SAF/AQCS
U.S. Department of Energy

Mr. Donald J. Singer
AF/JACP

Mr. Joseph Allen
Department of Commerce

Mr. Al Solga
Department of Commerce

Ms. Linda Greene
Navy DAR Council Representative

Mr. Fred Kohout
Office of Contract Policy & Administration
OASD (P&L)

Ms. Pamela Samuelson
University of Pittsburgh Law School

Mr. Michael Kirk
Assistant Commissioner for External Affairs
Office of Patents and Trademarks

HOTEL RESERVATION FORM

AIA INTELLECTUAL PROPERTY COMMITTEE MEETING

April 18-19, 1988

Omni International Hotel - Baltimore, MD

RESERVATIONS MUST BE MADE NO LATER THAN MARCH 25, 1988

MAIL TO: Reservations Manager
Attention: Sue Karr
Omni International Hotel
101 West Fayette Street
Baltimore, MD 21201

OR CALL: (301) 752-1100, Sue Karr

NAME _____ TITLE _____
COMPANY _____ TELE. NO. _____
ADDRESS _____

Accommodations Requested:

_____ Single \$85.00 _____ Double \$85.00
_____ Smoking _____ Non-Smoking

Dates:

April 17 _____ April 18 _____ April 19 _____ April 20 _____

If you wish to guarantee arrival past 6 p.m. please check here _____

Credit Card No.: _____ Ex. Date _____

Arrival Date _____ Time _____

Departure Date _____ Time _____

PERLMAN & PARTNERS

A PARTNERSHIP INCLUDING A PROFESSIONAL CORPORATION
1233 TWENTIETH STREET, N.W.
SUITE 700
WASHINGTON, D.C. 20036
TELEPHONE (202) 223-6455

DAVID S. PERLMAN, P.C., DC, MA, FL
JOSEPH T. CASEY, JR., DC
ALVIN A. SCHALL, DC, NY

TELECOPY: (202) 785-2281
TELEX: 197942 CCM DC

May 31, 1988

Defense Acquisition Regulatory Council
Attention: Mr. Charles W. Lloyd, Executive Secretary
ODASD(P)DARS
c/o OASD(P&L) (MRS)
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Subject: DAR Case 87-303

Dear Mr. Lloyd:

On behalf of certain manufacturers involved with sales of manufactured commercial goods to the Department of Defense, we wish to make the following comments concerning the proposed changes to DFARS Subpart 227.4:

(1) DFARS 227.472-3(a)(iii) deals with rights in technical data pertaining to "items, components or processes prepared or required to be delivered under any Government contract or subcontract."

The individual terms "items", "components" or "processes" should be defined. They are not defined in either the regulations, the statutes, or relevant case law. Confusion arises, for example, when there is a technical data called for on "parts" as opposed to "components".

For a commercial manufacturer interested in doing business with the government, the insistence on rights in parts, when it is not necessary for full utilization or maintenance of the end items being acquired, is a substantial deterrent. Competition is discouraged when undue data deliveries are required. For the commercial manufacturer, this is a matter of the utmost importance.

(2) Also with respect to this subsection, it should be made clear that the Government is entitled to form, fit and function data on what is to be delivered to the Government, and not on the components that may be included in what is to be delivered.

Defense Acquisition Regulatory Council
31 May 1988
Page 2

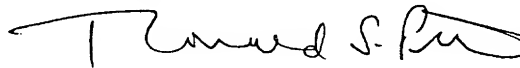
For example, where the Government is acquiring commercial end items, it needs form, fit and function information for acquisition, maintenance and operation of those end items, not on the processes involved in manufacturing them, or on the components included in them.

To require form, fit and function data on individual components in commercial end items which have been developed at private expense violates the statutory prohibition of 10 U.S.C. 2320(a)(2)(F) against requiring a contractor to relinquish rights in data developed exclusively at private expense. The statutory authorization to require form, fit and function data with unlimited rights runs only to items to be delivered, not to the components included in those end items. Thus, a broad interpretation (or misinterpretation) of the current regulatory language may result in an inadvertent violation of the statutory prohibition (which is generally dealt with in DFARS 227.473-2).

Clarification of the prohibition against requiring unlimited rights in component data, when commercial end items are being acquired, would avoid future violations of the statutory prohibition.

If further information on these points is appropriate, please advise, and we will supplement these comments with specific case examples.

Very truly yours,



Ronald S. Perlman



the computer software and services industry association

25 years of leadership

GEORGE T. DEBAKEY
EXECUTIVE DIRECTOR

May 31, 1988

Defense Acquisition Regulatory Council
Attn: Mr. Charles W. Lloyd, Executive Secretary
ODASD(P) DARS
c/o OASD (P&L) (MRS)
Room 3D139
The Pentagon
Washington, D.C. 20301-3062

RE: DAR Case 87-303

Dear Mr. Lloyd:

What follows are the comments of ADAPSO, The Computer Software and Services Industry Association, Inc. (ADAPSO) regarding the interim changes to Subpart 227.4 and Part 252 of the Defense Federal Acquisition Regulation (DFAR) Supplement governing rights in technical data. ADAPSO submits these comments in the interest of streamlining the Defense Department acquisition process, avoiding Government acquisition of technical data rights that are unnecessary for the Government to fulfill its mission or that are overly burdensome to maintain, and encouraging the development of future technologies, particularly where commercialization will advance technological development.

ADAPSO is the trade association of this nation's computer software and services industry. Its member companies and industry provide the public and the government with a variety of computer software and services including network-based information services, sophisticated software for mainframe, mini-, and microcomputers, professional systems analysis, design, and programming services, and integrated hardware/software systems. ADAPSO's members and industry are major contractors with the Federal Government, particularly the Department of Defense, giving ADAPSO a significant interest in this proceeding.

ADAPSO supports the policy set forth in Subpart 227.472-1(a) and (b), recognizing a Government interest in encouraging contractors to develop new technologies and to improve existing technologies by allowing contractors to exploit their efforts commercially. To this end, ADAPSO applauds Subpart 227.472-3(c) which requires negotiation where technical data is developed with mixed funding and the provisions of Subpart 227.473-1(b)(i), outlining specific criteria by which a contracting officer is to negotiate rights in technical data developed with mixed funding.

At the same time, ADAPSO urges the Department to move quickly to define a streamlined set of internally consistent regulations specifically applicable to computer software. This would go far to alleviate the confusion faced by contractors and contracting officers alike created by the current regulatory patchwork. In developing internally consistent, comprehensive regulations, however, the rights of creators of commercially available computer software (such as copyright rights) should be carefully guarded, the Government receiving only the minimum rights necessary to perform its function. This will benefit not only contractors but also the Government, which will be freed from the administrative burden and cost of protecting proprietary interests in technical data which are not absolutely necessary for the Government to fulfill its mission.

In this regard, ADAPSO is very concerned that certain provisions of the interim rule do not serve its underlying policy goals and may even interfere with software developers' rights in commercially available software and associated documentation. Subpart 227.472-3(a)(1)(iv) in particular grants the Department unlimited rights in manuals or instructional materials which are necessary for installation, operation, maintenance, or training purposes and which are prepared for or required to be delivered under any government contract. This same entitlement is also incorporated in Subpart 252.227-7013(b)(1)(iv). These unlimited rights would allow DOD to use, duplicate, release, or disclose technical data in such manuals in any manner and for any purpose whatsoever. Moreover, the current DFAR and the interim rule appear to be identical in this regard.

DOD's usual practice in contracts for the acquisition of commercial ADPE products is to include a requirement for delivery of technical manuals which support the equipment. These manuals are developed exclusively at private expense and are protected by U.S. copyright law. Both the existing regulation and the interim rule clearly impinge on the copyright owner's rights.

This is contrary to both the expressed intent of Pub. L. 99-661 which underlies the interim rule and the philosophy of Executive Order 12591. Pub. L. 99-661 directs that the mandated technical data regulations may not impair any right of any contractor with respect to patents or copyrights. Further, the

accompanying Conference Report advises that DOD should generally seek to acquire the same rights in data that a commercial customer would be granted in acquiring the same product.

ADAPSO contends that the obvious intent of Pub. L. 99-661 should supersede a contradictory and altogether too literal interpretation of the provision regarding manuals or instructional materials. A distinction must be made between DOD's data rights to these items when prepared at private expense only and when they are prepared with full or partial Government funding. ADAPSO recommends that Subparts 227.472-2 and 252-7013 be modified to reflect this distinction in order to bring the regulations into concert with the stated acquisition policy that DOD should obtain only the minimum, essential technical data rights.

Otherwise, the definition of "computer software documentation" of Subpart 227.471, "including computer listings and printouts, in human-readable form," may be construed to include a computer program's source code, the principal asset of software developers.

Subpart 227.472-3(a)(1)(ii), which awards the Government unlimited rights in "[t]echnical data resulting directly from performance of experimental, developmental, or research work," may extend unlimited rights even in situations where a contractor or subcontractor can demonstrate that it would have developed such data even if no contract or subcontract had been awarded.

Subpart 227.473-1(b)(1)(iii) requires contracting officers to review and evaluate restrictions asserted in pre- or postaward notifications on the Government's right to use or to disclose technical data or computer software, but allows contracting officers to forego negotiations on the assertions where "negotiations are not practicable." The section does not define those situations in which negotiations would be impracticable or otherwise offer any guidance as to impracticability.

Subpart 227.473-1(b)(2)(iii) provides that where time limitations for either Government Purpose License Rights (GPLR) or limited rights are negotiated, they should normally be no less than one year nor more than five years. A two-year minimum period, however, would reflect more accurately the economic life of software technology, one of the criteria of this section, and would more closely accord with current, commercial practice.

Finally, Subpart 227.473-1(c)(2) requires that a nonGovernmental recipient of technical data subject to GPLR sign a Standard Non-disclosure Agreement provided in the regulations. The regulations are silent, however, with regard to a similar requirement for nonGovernment recipients of technical data subject to limited rights. ADAPSO is concerned that such silence could well lead to inconsistency or oversights regarding protection of this type of information.

Incorporation of the above-suggested changes and the corresponding future amendment of the DFAR Supplement on software rights will further the policy objectives of the National Defense Authorization Act (Pub. L. 100-180) as well as encourage the development of new technologies and the improvement of existing technologies.

If your office has any questions about these comments or otherwise requires ADAPSO's help, please feel free to call upon us.

Sincerely,



George T. DeBakey
Executive Director

CC: ADAPSO Policy and Regulation Subcommittee



Tektronix, Inc.
Tektronix Industrial Park
P.O. Box 500
Beaverton, Oregon 97077

Phone: (503) 627-7111
TWX: 910-467-8708
Telex: 151754

27 May 1988

Chairman, DAR Committee
Defense Acquisition Regulatory Council

Attn: Mr. Greg Petkoff
The Pentagon, Room 3C841
Washington, D.C. 20301-3062

Reference: DAR Case 87-303, DFARS 52.227-7013

Tektronix is a producer of commercial, state of the art, test and measurement equipment. Our commercial products are developed exclusively at private expense. I am writing this letter because Tektronix is concerned about the method the DAR Council has chosen to comply with 10 USC 2320, Rights in Technical Data.

As you know, the reference DFARS clause directs the DoD contractor to place the Limited Rights Legend on each piece of technical data supplied to the DoD that the contractor asserts falls under such rights. In addition, the Limited Rights in the interim clause also specifically requires "The number of the prime contract under which the technical data is to be delivered" to be marked on each piece of technical data.

If documentation is not so marked, it is presumed to be supplied with unlimited rights. The underlying philosophical approach appears to be that every piece of documentation which the contractor desires to protect must be specially marked.

This requirement causes considerable special review and handling of the orders from DoD. Tektronix shipped approximately 40,000 commercial instruments to the U.S. Government in the past year. Had technical documentation been required to be shipped with each instrument and had the proposed clause been included in each contract, (a possible, but unlikely event) significant additional special handling time would have had to be expended by Tektronix to effect the marking requirement. Since this requirement is special to the Government, Tektronix would look to DoD for compensation for this additional special effort. For this additional cost, no additional value would be provided to DoD.

Mr. Greg Petkoff, Chairman, DAR Committee
Defense Acquisition Regulatory Council
Washington, D.C. 20301-3062
Reference: DAR Case 87-303, DFARS 52.227-7013

27 May 1988
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While the underlying philosophy, i.e. mark everything, may be appropriate for technical documentation developed exclusively for DoD, Tektronix considers the approach to be inappropriate for commercially developed technical documentation. The best solution at the lowest cost and providing compliance with 10 USC 2320, would be to change the regulation to declare that all commercially developed technical documentation supplied to DoD should be considered supplied with limited rights, unless otherwise marked. This would eliminate the burdensome legend marking requirements contained in the interim clause and remove one more impediment to the suppliers of commercial products.

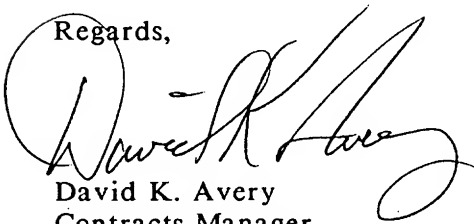
Should this approach of eliminating the legend marking be unworkable, Tektronix as a minimum, requests a special legend for commercial products be developed. This legend would be similar to the Restricted Rights Legend in paragraph (c)(1)(ii), allowing commercial producers to preprint the legend in their commercial technical documentation without a specific contract number. The following is a proposed legend:

Limited Rights Legend

This document was developed exclusively at private expense. The restrictions governing the use and disclosure of technical data marked with this legend are set forth in the definition of "limited rights" contained in DFARS clause 52.227-7013, Rights in Technical Data and Computer Software (APR 1988).

The requirement to have the individual prime contract number on the current limited rights legend serves no useful purpose on commercial technical documentation.

Regards,



David K. Avery
Contracts Manager
Federal Systems Division

1-0039

STERER

ENGINEERING AND MANUFACTURING COMPANY
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Telephone: (818) 409-0200 • FAX: (818) 241-3772 • TWX: 910-497-2263

DRF0588-448
May 27, 1988

Defense Acquisition Regulatory Council
The Pentagon
Washington, DC 20301-3062

Attention: Mr. Charles W. Lloyd
Executive Secretary
CDASP (P) DARS c/o OASD (P&L) (MRS)
DAR Case 87-303

Dear Mr. Lloyd:

Sterer Eng. & Mfg. Co. has reviewed the DAR Council interim changes to Subpart 227.4 and Part 252 of the DFARS as published in the Federal Register on April 1, 1988. We cannot support implementation of the proposed changes without revision to correct problems in the language and definitions as currently written.

Sterer does endorse the comments provided to your office, pursuant to the 60 day public comment period, by the Proprietary Industries Association via Co-Counsels H. Hill Jr. and R. Brunette. We consider inclusion of the PIA comments an essential element to achieve a final regulation that deals fairly with Innovative Sub-Contractors such as ourselves and the other 87 member companies of the association.

We urge your incorporation of the PIA comments as a step toward normalizing the Industry/Government data rights problem and reducing the existing adversary relationship on this issue.

continued.....



Computer & Communications Industry Association

May 31, 1988

Mr. Charles W. Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
ODASD(P)/DARS
c/o OASD(P&L) (MRS)
Room 3D139
The Pentagon
Washington, D.C. 20301-3062

Re: DAR Case 87-303

Dear Mr. Lloyd:

The Computer & Communications Association (CCIA) is pleased to submit its comments on the DAR Council's latest revisions in the technical data rights regulation published in the Federal Register on April 1, 1988. CCIA has submitted comments on the various regulatory changes that DOD has proposed because proprietary technological information is the lifeblood of our member companies. CCIA is an association of approximately 70 member companies that represent all facets of the computer and communications industries. Since many of our members actively compete in the federal marketplace, we have reviewed this most recent interim rule with great interest.

Overall, CCIA believes that the interim rule is a significant improvement over previous rules, and is pleased that a number of changes that CCIA has supported have been incorporated. The new rule, which implements section 808 of P. L. 100-180, also addresses two issues that were raised in the context of last year's data rights proposals and comments, namely commercialization and non-disclosure agreements. These comments will, among other things, address those new issues.

At the outset, we note that the interim rule, in addition to implementing the data rights section of P. L. 100-180, also simplifies and streamlines Subpart 227.4 of the DFARs, which CCIA applauds. However, CCIA still believes that merging the FAR and DFAR provisions regarding technical data rights would provide the most helpful simplification as far as the contracting community is concerned. As a result, CCIA once again urges the DAR Council to expedite the process of developing a single data rights regulation that would be applicable government-wide.

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CCIA supports the interim rule's change in section 227.472-3(c), which deals with rights in technical data developed with mixed funding. This section now provides that the contracting officer will negotiate rights when there is mixed funding and no longer contains what CCIA argued was an inflexible rule regarding the percentage of funding provided by each party. In the language of the interim rule, it is clear that, even if a contractor has provided less than 50 percent of the funding, he has an opportunity to negotiate certain rights in the data. We believe that the DAR Council should continue to encourage further flexibility in this area so that the Government will be able to receive the full benefit of innovation by the private sector.

The definition of "developed at private expense" (section 227.471) appears to establish a two-pronged test that, when read as a whole, is circular. That definition states "in connection with an item, component or process, that no part of the cost of development was paid for by the Government and that the development was not required as an element of performance under a Government contract or subcontract." It then states that "[a]ll indirect costs of development are considered Government funded when development was required as an element of performance in a Government contract or subcontract" and "[i]ndirect costs are considered funded at private expense when development was not required as an element of performance under a Government contract or subcontract."

This test is likely to create confusion. There would be no Government direct costs for development of an item that was not called for as an element of performance under a Government contract. Therefore, indirect costs become the sole concern. The new definition states that indirect costs of development will only be considered to be Government funded if the item was required as an element of performance under a contract. Otherwise, they are considered privately funded. Therefore, the test boils down to whether an item was required as an element of performance under a Government contract. If it was not, then it is considered to be "privately-funded".

As a result, there appears to be no need for the cost prong of the test. CCIA urges the DAR Council to revise its definition to state simply that an item will be considered to be funded at private expense if development of the item was not required as an element of performance under a Government contract or subcontract.

Section 227.473-1 sets forth comprehensive procedures for establishing rights in data pursuant to which contractors can obtain commercial rights in data or, in some instances, computer software. These procedures seem to balance the concerns of contractors and the needs of the

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government and include a number of specific factors that contracting officers are to consider when negotiating rights in technical data. In addition, the time periods set forth for government purpose license rights or limited rights appear to be reasonable, particularly given the fact that section 227.473-1(b)(2)(iii)(C) provides for extensions of the time limitations under certain circumstances.

The Standard Non-disclosure Agreement set out in the rule applies to situations involving technical data that is subject to other than unlimited rights. CCIA supports the requirement that each contractor be required to sign an agreement prior to receiving data subject to Government purpose license rights. CCIA believes that the terms of the agreement are sufficient to protect restricted data.

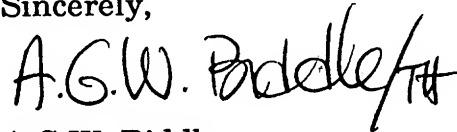
In response to the DAR Council's request for comments on an alternative approach to the use of non-disclosure agreements, CCIA submits that the proposed alternative approach is not sufficient to protect restricted data. The DAR Council suggests that, in lieu of requiring a signed non-disclosure agreement, a solicitation provision would notify offerors that the solicitation included restricted data and would require offerors to safeguard the data.

CCIA strongly objects to this approach since recipients of a solicitation might not read the warning provision carefully and, more importantly, could potentially use data with little accountability. This alternative suggests an "honor code" which, due to the potential value of restricted technical data, simply cannot be relied upon to protect technical data. Contractors must be required to sign a specific agreement prior to receiving the restricted data. The agreement provides the necessary emphasis on the restricted nature of the data and further provides the contractor holding the exclusive commercial rights with specific rights against a violator of the agreement. In the absence of such an agreement, the owner of data may not have any ability to enforce restrictions on data usage against a Government contractor. The Government itself has little incentive to enforce the rights of private individuals in intellectual property. Therefore, an agreement specifically giving the real party in interest the right of enforcement is essential to preserve the restrictions which the DAR Council rightly places on use of GPLR or limited rights data.

Mr. Charles W. Lloyd
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CCLA appreciates the opportunity to comment on the latest technical data rights rule and would be pleased to provide any additional information that you require during your consideration of this important regulation.

Sincerely,

A handwritten signature in black ink that reads "A.G.W. Biddle" followed by a stylized flourish or set of initials.

A.G.W. Biddle
President



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May 31, 1988

1987-88

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Defense Acquisition Regulatory Council
ATTN: Mr. Charles Lloyd, Executive Secretary
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c/o OASD (P&L) (MRS)
Room 3D139
The Pentagon
Washington, D.C. 20301

Re: Interim Defense Department Technical
Data Regulations, DAR Case 87-303,
53 F.R. 10780, April 1, 1988

Dear Mr. Lloyd:

This letter is written on behalf of the Section of Public Contract Law of the American Bar Association pursuant to special authority extended by the Association's Board of Governors for comments by the Section on acquisition regulations. The views expressed are those of the Section and have not been considered or adopted by the Association's Board of Governors or its House of Delegates.

On April 16, 1987, the Department of Defense (DoD) issued final technical data rules to revise DFARS Subpart 227.4 to implement Section 953 of Pub. L. 99-500, the Defense Acquisition Improvement Act of 1986. However, Section 808 of Pub. L. 100-180, the National Defense Authorization Act for FY 1988-89, enacted after issuance of the final rules, required DoD to make certain revisions to DFARS Subpart 227.4 and Part 252. Accordingly, on April 1, 1988, DoD issued an interim rule and request for comments designed to implement the Act.

The comments which follow in large part address whether the interim regulations comply with the statutory mandate of the DoD Authorization Acts.



I. § 227.470: Scope

The Interim Rule differs from the final rule issued in 1987 in that the provision previously set forth at § 227.470, recognizing minimum government rights to technical data, has been deleted. Section 227.470 of the former rule stated at subsection (a) that "[t]hese sections ensure that the DoD shall obtain only such minimum technical data and data rights as are essential to meet government needs. . . ." Although § 227.472-2 of the Interim Rule clearly spells out DoD policy to obtain only such minimum technical data rights as are essential to meet Government needs, and that DoD "will use the least intrusive procedures in order to protect the contractor's economic interests . . . ," the deletion of this provision in the Interim Rule is without merit and may contribute to the perception that DoD is relaxing its "minimum rights" policy, which would be contrary to congressional intent. This provision should be reinstated into DoD's technical data coverage.

II. § 227.471: IR&D, B&P and Other Indirect Costs

The Interim Rule recognizes that independent research and development (IR&D) and bid and proposal (B&P) costs are deemed to be "at private expense." However, for all other indirect costs, the Rule sets forth the following standard for determining whether indirect costs of development are government-funded or at private expense: whether the development in question was required as an element of performance under a government contract. If so, such indirect costs are deemed to be government-funded. As currently written, this provision is inadequate in that it overemphasizes the fact that the development was or was not required under a government contract, while ignoring the parties' respective level of funding and other factors, including prior contractor commitment or expertise in the development effort. The Rule sets forth a fairly arbitrary standard that may not be capable of being flexibly applied. It would be preferable if this provision would be revised so that the parties' rights could be determined based on case-by-case negotiations and discussions between the parties.

III. § 227.471: Government Purpose License Rights

This category of rights permits the government to use, duplicate or disclose data "for government purposes only," which is defined to include competitive procurement. While the provisions at § 227.473-1(c), covering standard non-disclosure

agreements in the GPLR context, constitute a step in the right direction in attempting to prevent subsequent third party disclosure outside the government, we believe that, as currently drafted, the GPLR provisions are not a "middle ground" between limited and unlimited rights because such data can be used for competitive reprourement. Under the regulations, it is possible for the government to contribute minimally to the development effort and yet release all of the data relating to the license right to a contractor's competitors in the government or defense market, while excluding only the commercial market.

IV. § 227.471: Limited Rights

This section sets forth the provision governing limited rights to technical data. Subsections (a) and (b) list exceptions for when limited rights do not apply, i.e., the government will presumably receive unlimited rights to the technical data. Subsection (b) provides that limited rights do not apply when "[r]elease or disclosure to a foreign government . . . is in the interest of the United States and is required for evaluational or informational purpose. . . ." The regulations would allow a foreign government to disclose such data to a contractor who is a foreign competitor. This section should make clear, however, that foreign governments should not be authorized to use or release such data for purposes not permitted to the United States government.

V. § 227.472-2: Establishing Minimum Needs

This section provides that DoD will only obtain minimal technical data rights essential to meet its mission needs. It further provides that DoD, in deciding how to acquire technical data rights, will use the least intrusive procedures to safeguard contractor economic interests. However, this provision is not clear as to whether the government acquires rights to data not delivered. To be consistent with the emphasis on minimum governmental rights, the regulations should make clear that any government rights to technical data should accrue at the time of delivery and not earlier.

VI. § 227.472-3: Rights in Technical Data

This section sets forth the three basic types of technical data rights accorded the government: unlimited rights, government purpose license rights and limited rights. Our review of these provisions yields the conclusion that this section

simply does not go far enough to comply with DoD's stated policy for acquiring minimum rights in technical data. As currently drafted, the interim rule fails to comply with DoD's minimum rights policy in describing the various rights to technical data. Standing alone, this section appears to treat unlimited rights as the norm, which is apposite to DoD policy and congressional intent in this area.

At a minimum, in order that the government receive only those minimum rights essential to meet its needs, this section should provide at subsection (a)(2) that limited rights may also be an exception to unlimited rights. As currently written, that subsection recognizes only GPLR rights as an exception to unlimited rights. There are certainly situations in which DoD will not need even government purpose license rights. Under such circumstances, the government should be able to waive any unlimited rights in favor of limited rights. The GPLR exception is further watered down by a later provision at subsection (b)(2), which permits the government, as an exception to limited rights, to obtain greater rights in technical data.

Moreover, subsection (c) of this section sets forth procedures governing rights in technical data in mixed funding situations, i.e., where both DoD and the contractor have contributed to the development effort. However, the only instruction set forth in this provision is that "[n]egotiations shall begin at the earliest possible time and the results shall be incorporated into the contract preferably at time of award, but in any event, before delivery of the data." The section further states, in language favorable to DoD, that the government receives unlimited rights whenever the contractor fails to provide notice as set forth at § 252.227-7035 or 252.227-7013. However, this provision should explicitly reference DoD's policy to receive only the minimum rights to technical data that are least intrusive on a contractor's economic interests in order to comply with DoD policy and congressional intent in this area.

VII. Notification of Limited Rights Data

Sections 227.473-1(a)(2) and 252.227-7035 set forth the procedures governing preaward notification under any government contract requiring delivery of technical data. Contractors are required to identify all items, components, processes or components to be delivered with other than unlimited rights, and must also submit a Technical Data Certification, prior to receiving government approval. While predetermination of rights

Mr. Charles Lloyd
May 31, 1988
Page 5

in technical data is a proper goal in this setting, the interim rule fails to recognize that in the R&D area, for example, contractors may not know, prior to the contract, which data will be delivered with other than unlimited rights. Accordingly, the regulations should be revised to correct this potential hardship for contractors.

VIII. § 227.473-1(b): Negotiation Factors
in Mixed Funding Situations

On a related point, this section sets forth a series of factors to be considered when negotiating rights in technical data developed with mixed funding or when the government negotiates to relinquish rights or acquire greater rights. These factors include the acquisition strategy for the item or system involved, whether the item or system will be competed, the timing of such competition, whether the technology can be commercialized, the funding contributions of the respective parties, the development of alternative sources for industrial mobilization or other purposes, and the burden on the government of protecting the contractor's rights in technical data.

The Interim Rule fails to comply with DoD's stated policy and congressional intent in this area. First, the criteria as currently written do not recognize other development factors -- including prior investment and development expertise or unique contractor qualifications -- and instead overemphasize the mere dollar contribution to the overall development process. Thus, as presently written, the regulations ignore the degree to which the specific acquisition in question is dependent on previous development efforts. Moreover, it is inconsistent with DoD's policy to acquire only minimum technical data rights to set forth a factor covering the burden on the government of protecting the contractor's rights in technical data while failing to include a corresponding factor addressing the burden on the contractor of surrendering its legitimate proprietary interests to the government. For these reasons, the current language is impermissible and contrary to law, and should be revised.

IX. § 227.473-2(b): Prohibitions

The Interim Rule omits, for no apparent reason, a clause contained at § 227.473-2 of the former rule issued in 1987. That section addressed procedures by which the government could seek to obtain greater rights in technical data. In language consistent with congressional intent in this area, the former

Mr. Charles Lloyd
May 31, 1988
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rule provided at § 227.473-2 that the "refusal to negotiate by a contractor [for greater government rights to technical data] shall not constitute the basis for disqualification for award of a contract or subcontract. . . ." The Interim Rule omits this clause and provides only that a contractor "may not be required, as a condition of being responsive to a solicitation or as a condition for award of the contract or subcontract to sell or otherwise relinquish to the government any rights in technical data beyond those which the Government is entitled" DFARS § 227.473-2(b)(1). By omitting the clause, the Interim Rule arguably suggests the government's ability to acquire such rights can be a pivotal condition for award. The provision goes on to state that it is permissible to evaluate such factors on the government's ability to use or disclose the technical data, and that nothing prohibits agreements which provide the government with greater rights than it otherwise would be entitled to.

Taken together, the Interim Rule weakens the prior protections accorded contractors. Simply stated, the contractor is not fully protected -- as mandated by Congress -- when DoD is permitted under one clause to evaluate such limitations on its rights to technical data and the next sentence provides that nothing should prohibit agreements that accord the government greater rights than they may otherwise be entitled to. We recommend that the former clause, stating that any refusal by a contractor to negotiate greater government rights in technical data shall not constitute the basis for contract award disqualification and shall not constitute a pivotal condition for award, be reinserted. This recommendation is entirely consistent with congressional intent in this area.

X. § 227.473-4, § 252.227-7037: Validation Procedures
-- Final Decision When Contractor Fails to Respond
to a Challenge Notice

The interim regulations may enable the government to remove restrictive marking prior to final adjudication on the validity of the markings. Under the rules, the contracting officer will issue a final decision pertaining to the validity of the asserted restriction if the contractor fails to respond to a challenge notice within 60 days. DFARS § 252.227-7037(e). However, this language appears to be inconsistent with § 252.227-7037(d)(1)(iv), which provides that the government's challenge notice shall state that contractor's failure to respond to a challenge notice "may result in issuance of a final decision. . . ." (Emphasis added.) DoD appears to be sending conflicting signals here. First, the contractor is being told in

Mr. Charles Lloyd
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a challenge notice that a failure to respond may result in a final decision. But if and when the contractor fails to respond, the regulations state that the contracting officer will issue a final decision pertaining to the validity of the markings.

It is important in this context that DoD protect proprietary data in the event the contractor decides to appeal from a final decision. Toward this end, subsection (e) should be rewritten to better comply with subsection (d)(1)(iv), as well as congressional intent that restrictive marking may not be removed so long as the validity of the markings may be contested. See, e.g., 10 U.S.C. § 2321(f) (markings may be cancelled only "upon final disposition" of claim pertaining to validity of the asserted restriction).

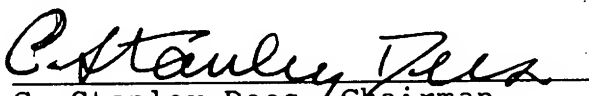
XI. § 227.473-4, § 252.227-7037: Removal
of Marking Prior to Final Adjudication

The Interim Rule permits the government to cancel restrictive markings if the contractor fails to appeal, file suit, or provide the notice of intent to file suit to the claims court within 90 days after the contracting officer's final decision that the markings are not justified. DFAR § 252.227-7037(a)(f)(iv). Under the regulations, the contractor may lose the one-year protection under the Contract Disputes Act for failing to act within 90 days of the final decision. Contractors will only receive the one-year protection if they appeal, file suit, or provide a notice of intent to file suit to the claims court within 90 days of the final decision. Thus, the interim regulations as presently written appear to violate the one-year provision in the Contract Disputes Act. It is impermissible to shorten the statutorily-authorized time limitations in this manner.

Conclusion

We respectfully request that these comments be considered in the issuance of a final rule, to fully comport with the statutory requirements of the Defense Acquisition Improvement Act of 1986 and the DoD Authorization Act for FY 1988-89.

Sincerely,


C. Stanley Dees, Chairman
Section of Public Contract Law

HCC SCIENCE & TECHNOLOGY COMPANY, INC.

86 Morris Avenue
Summit, NJ 07901-3956

May 31, 1988

Eugene Steadman, Jr.
(703) 836-1469

Defense Acquisition Regulatory Council
ATTN: Charles W. Lloyd
ODASD(P) DARS
The Pentagon, Room 3D139
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

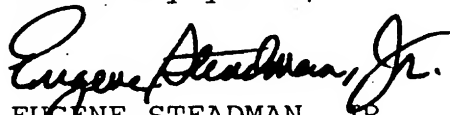
The DOD "Interim Rule on Rights in Technical Data," published in the April 4, 1988 issue of Federal Contracts Report, has been reviewed for applicability to our research activities with the federal government. Specific comments are attached for your consideration in issuing a final rule consistent with Federal Acquisition Regulation (FAR) coverage due to be issued by the end of September, 1988.

In general, where there is no clear statement or distinction made as to the proprietary nature of technical data, the DOD apparently assumes unlimited rights thereto. A recommended approach to implement better the intent of the President's Executive Order Number 12591 for promoting the commercialization of technology is to define "Proprietary Data" and to describe how such data, where developed through total private or mixed funding, is retained by the contractor with negotiated government purpose license rights (GPLR) as compared to unlimited rights.

Any questions or comments should be forwarded to:

HCC Science & Technology Co., Inc.
ATTN: Dr. E. Steadman, Jr.
Suite 400
1201 E. Abingdon Drive
Alexandria, Virginia 22314

Sincerely yours,


EUGENE STEADMAN, JR.
Vice-President

Attachment

SPECIFIC COMMENTS TO DOD INTERIM
RULE ON RIGHTS IN TECHNICAL DATA

1. The provision at 227.472-3, paragraph (b)(1) states, "...the Government will obtain limited rights in unpublished technical data pertaining to items, components, or processes developed exclusively at private expense, provided the data are properly marked with the limited rights legend..." The implication here -- in view of paragraph (c) in the same provision which states that with regard to rights in technical data developed with mixed funding, absent any notice the government shall have unlimited rights in the technical data and shall have met the obligation to negotiate -- is that for unmarked proprietary data developed at private expense, the Government acquires unlimited rights. The area of technical data developed at private expense needs further expansion and definition in the DoD Rule.

2. The absence of a definition for "Proprietary Data" does not appear to offer the degree of encouragement and facilitation permitting Federal contractors to retain rights to technical data, generated by grants and contracts, for commercialization of technology as envisioned in Executive Order Number 12591, "Facilitating Access to Science and Technology," dated April 10, 1987. Accordingly, recommend:

(a) A definition of "Proprietary Data" be added;

(b) Adequate procedures be provided through which a contractor can withhold proprietary data from delivery with no rights to the Government except Inspection Rights for a specified period of time to verify the withholding of such data from contract performance; and

(c) Replace to the extent possible for mixed and private funding, Government rights in technical data with provisions for royalty-free, Government purpose license rights (GPLR).

3. The DoD Interim Rule clearly focuses on the need for competition in procurement and large RDT&E contracts. In the area of small to medium size contracts for basic (6.1), exploratory development (6.2), and advanced technology development (6.3) research, the technical data rights cannot only limit commercialization of technology, but stifle innovativeness as well. The burden of compliance (as proposed) on most universities and small businesses is a mitigating factor which should be considered. Recommend provision 227.470, "Scope," be expanded to distinguish between the intent of the DoD Rule and those RDT&E areas (e.g., 6.1/6.2) where it should have minimum impact.

PLESSEY

Plessey Electronic Systems, Inc.

1215 Jefferson Davis Highway
Crystal Gateway III, Suite 1203
Arlington, Virginia 22202
Telephone: (703) 920-7575 Telex: 353 244 FAX: (703) 920-7530

1 JUNE 1988

FACSIMILE

TO: MR. CHARLIE LLOYD
REF: DAR CASE NO. 87-303
FROM: MR. DAVID SCILLITOE
PLESSEY DEFENSE SYSTEMS

SUBJ: REQUEST FOR COMMENTS ON 48 CFR PARTS 227 AND 252.

PLEASE ACCEPT THE FOLLOWING FOUR PAGES FOR CONSIDERATION
WITH YOUR REQUEST FOR COMMENTS.

THANK YOU.

FOC: DEBORAH ANSELL

DEPARTMENT OF DEFENSE
FEDERAL ACQUISITION REGULATION SUPPLEMENT;
PATENTS, DATA, AND COPYRIGHTS

The Federal Register, Vol 53 No. 63, Friday April 1, 1988 announced an interim rule and request for comments on 48 CFR Parts 227 and 252.

This is a response to the request for comments.

1. Commercialization

- 1.1 Arrangements whereby a contractor may be granted exclusive commercial rights in technical data are to be welcomed. There are many cases where data created under a Government funded contract has commercial application and contractors will be encouraged to bid more competitively for work if exclusive commercial exploitation rights can be secured. Indeed only with an exclusive commercial exploitation right will a contractor be prepared to put the effort into marketing the product of the data in the commercial market.
- 1.2 GPLR will secure for the Government's rights for its normal purposes and the application of DOD FARS 52.235-7002 will ensure returns to the Government upon such exploitation. In this latter regard, the report by the GAO to the Secretary of State for Defense, GAO/NSIAD-86-95 Non-recurring Costs, recommends a more pragmatic approach to cost recovery. If a flat rate percentage were to be applied this could be administered simply and DOD FARS 52.235-7002 could be applied without a financial threshold (see DOD FARS 35.7103).
- 1.3 There appears to be a potential conflict in granting the Government unlimited rights and the recoupment terms of DOD FARS 52.235-7002. For, notwithstanding the contractor continuing to own the copyright in the data, the work remaining unpublished and the data being unlikely to fall into the public domain (see DOD Directive 5230.25, Withholding of Unclassified Technical Data from Public Disclosure, November 6, 1984) the granting of unrestricted rights to the Government hinders the enforcement of confidentiality and commercial licences and brings into question the enforceability of DOD FARS 52.235-7002. The granting of GPLR would remove any doubt of enforceability.
- 1.4 The period for which a contractor may have exclusive commercial rights may need to be capable of being extended. For a number of reasons the data or its product may not have been exploited fully within an initial period. If there is real potential for commercial exploitation from which the Government should obtain

recoupment fees then it would be in the interests of both the Government and the contractor that the period be extended; for example, commercial licences may be undermined by the reversion to the Government of unlimited rights. Arrangements may need to be made to avoid a contractor retaining exclusive exploitation rights and then taking no steps to exploit, either by intention or indolence.

- 1.5 It would be expected that a contractor be granted exclusive commercial exploitation rights in a product and/or its data only where it was responsible for the integrity of the design of the product and/or its data. In this way a contractor would not be able to secure exclusive commercial exploitation rights where it was working to specific directions or under the direct control of another that removed the responsibility of the contractor for the design of the product or data - thus where subsystems designs were subcontracted by a systems contractor then the systems contractor would not have the exclusive commercial exploitation rights in the subsystem. In this latter case, the systems contractor would have to negotiate a bilateral arrangement with the subsystem contractor to be able to exploit fully the system itself. In such cases recoupment fees would be payable once only on the final commercial transaction; the system contractor would pay a recoupment fee on the total commercial transaction (sale price or licence revenue) less any freight, insurance, packaging, financing, agents' fees, Federal, State and local taxes, and the price paid for articles purchased which include a recoupment fee payable to the Government.

2. Non-Disclosure Agreements

- 2.1 It is of some surprise that there does not exist already an undertaking, either express or implied, that a recipient of data supplied by the Government is to hold such data in confidence and not to use, or copy it except for the purposes for which it is supplied and to disclose to only those who have a need to know, under the conditions of use and confidence, for the purposes for which it is supplied - subject to the usual trade secret exceptions. It is recommended that such conditions be made a standard condition of contract under the Federal Acquisition Regulation and, where data is to be supplied consequent upon the issuance of a solicitation, that such data is supplied only upon an express undertaking made by prospective bidders. In this latter regard, a pro forma acknowledgement of intention to bid might embody a standard non-disclosure agreement. The alternative approach to non-disclosure agreements set forth at paragraph A 2.(b) of the Supplementary Information to the Interim Rule is not supported.

2.2

Where contracts are awarded to third party contractors for use of GPLR technical data for Government purposes it is recommended that it be a condition of contract that the third party enter into a direct confidentiality and non-disclosure agreement in a prescribed form with the contractor who has exclusive commercial exploitation rights. Such an agreement may then be supplemented with any necessary undertakings between those parties for the original contractor to provide technical assistance to the third party contractor to facilitate its efficient use of that data - it would be expected that the reasonable cost of such technical assistance to the third party contractor would be an allowable cost under its contract with the Government. In these circumstances direct privity of contract in the confidentiality and non-disclosure agreement is to be preferred over a third party beneficiary right.

3.

Government Purpose License Rights (GPLR)

The definition of GPLR at 227.471 and 252.227-7013(a)(14) in the April 1988 Interim Rule differs from the previous definition of the May 1987 Regulation by referring only to "data" in its third line rather than "technical data" - this may be an error, since "technical data" is used later in the definition. However, it is recommended that GPLR should include both technical data and computer software where, but for an agreement on exclusive commercial exploitation, the Government would acquire unlimited rights.

4.

Unpublished Works

The definition of "Unpublished" set forth at 227.471 and 252.227-7013(a)(20) in the April 1988 Interim Rule begs the question as to whether the delivery of unlimited rights technical data or computer software to or for the Government under the contract does or does not, in itself, constitute release to the public. It is recommended that an express statement be included in the definition to extend the definition of Unpublished to such unlimited rights data; for without such a statement it might be understood that recipients of such data were free to use, disclose and exploit that data, since it is otherwise deemed to be in the public domain - this is surely not the intention of the Government. If the unlimited rights data is commercially exploitable it falls outside the definition of an "agency record" for the purposes of 5 U.S.C. 552 as excepted by 32 C.F.R. 518.3(b)(2)(iii). In addition DoD Directive 5230.25, Withholding of Unclassified Technical Data from Public Disclosure, November 6, 1984 would seek to prevent unrestricted disclosure to the public of even unlimited rights data. The Government's intent appears to be to control commercially exploitable information prepared at its expense - this needs to be fully reflected in the appropriate regulations.

5.

Authorized Legends

As with previous Regulations, 252.227-7013 (Apr 1988) does not clearly and unambiguously set forth the authorized legends. It is recommended that authorized legends be set forth in bold type or indented and blocked or otherwise isolated from the general text of the regulation. In particular, the Limited Rights Legend is confusing and appears to include references to subparagraphs of the text of the regulation without full referencing, but merely stating "above".

D J SCILLITOE

21 May 1988

89-303
0000802
6/1/88

Orbital
Sciences
Corporation



May 31, 1988

Defense Acquisition Regulatory Counsel
ATTN: Mr. Charles W. Lloyd, Executive Secretary
Cafritz Building (U. S. Air Force Entrance)
1211 South Fern Street
Arlington, Virginia 22202

RE: DAR Case 87-303

Dear Sir:

This letter is being submitted on behalf of Orbital Sciences Corporation ("OSC") in response to the request for comments on the interim changes to DFARS 27.471 and DFARS 552.227-7103 that were issued by the Defense Acquisition Regulatory Counsel effective April 2, 1988.

We believe that the proposed new definition of "Required as an Element of Performance Under a Government Contract or Subcontract," which is contained in the definitions of "Developed Exclusively with Government Funds" and "Developed Exclusively at Private Expense," contains a potential ambiguity that could lead to an interpretation that would seriously restrict the property rights of Government contractors who have invested in privately funded development. The proposed new rules base the allocation of intellectual property rights in a given item, component or process on whether the contractor or the Government funded development and whether the development was "required as an element of performance under Government contract." Development is deemed to be "required as an element of performance under Government contract" if such development is "specified in a Government contract" or if such development is "necessary for performance" of a Government contract.

We believe that the "necessary for performance" clause is overly broad. If an item, component or process is to be used in the performance of a Government contract, it could be argued that the development of such item, component or process was "necessary for performance" of such contract. Thus, even if an item were developed solely with private funding under an independent, private development program, and if the owner then entered into a Government contract to produce the item for sale to the Government, it might be argued that the original private

Defense Acquisition Regulatory Counsel
Page 2
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development was "necessary for performance" of the subsequent production contract, and the owner was thereby precluded from asserting ownership rights to the technology. This type of interpretation would operate as a serious disincentive to private development of technology for use in Government contracts.

The ownership of intellectual property rights should depend on whether the Government or the contractor paid for the development. Even if it were necessary to include some reference to whether the item was a deliverable under a Government contract---and we believe it is not---the overly broad "necessary for performance" loophole should be deleted from the proposed regulations.

Respectfully submitted,

Leslie C. Seeman
sa
Leslie C. Seeman
Assistant General Counsel

LCS/sra

88-004FA



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

May 31, 1988.

Defense Acquisition Regulatory Council
Attention: Mr. Charles Lloyd
Executive Secretary
OASD(P) DARS,
c/o OASD (P&L) (MRS), Room 3D139
The Pentagon
Washington, D.C. 20301-3062

Re: DAR Case 87-303 Department of Defense Federal Acquisition
Regulation Supplement; Patents, Data, and Copyrights

Dear Mr. Lloyd:

These are the comments of the Chief Counsel for Advocacy of the U.S. Small Business Administration in response to the April 1, 1988 interim rule on the ownership of patents, data, and copyrights under Department of Defense contracts (53 Fed. Reg. 10781). Advocacy supports expanding contractor rights in technical data for commercial purposes and agrees that the Government should make every effort to protect these rights. I am commenting on several areas where the interim rule is overly complex or burdensome and should be streamlined. I also have suggested some technical and drafting changes. Finally, while the DAR Council has performed a regulatory flexibility analysis of the rule, this analysis does not follow the Council's own procedures for conducting such analyses and is inadequate for the task of assessing impacts on small firms.

The comprehensive interim rule implements changes required under Section 808 of P.L. 100-180 and Executive Order 12591. The rule also addresses DAR Case 87-37 concerning non-disclosure agreements initiated in the April 16, 1987 partial final rule (52 Fed. Reg. 12391).

The Office of Advocacy commented on the previous technical data rulemaking and supports the two goals embodied in that rule: contractor ownership of commercial rights in technical data and government ability to use most technical data for reprourement, repair or maintenance. The April 16, 1987 final rule created a new class of rights called Government Purpose License Rights (GPLR). The April 1, 1988 interim rule

expands GPLR and also attempts to implement Section 808 and E.O. 12591 which call for expansion of contractor rights in technical data to a greater extent than the April 16, 1987 final rule. The interim rule also reflects Section 808's prohibitions on forcing contractors to relinquish rights in data developed at private expense, and its encouragement of contractors to license the use of their data to third parties for both commercial and governmental purposes.

These strictures complicate acquisition and dissemination of data, however, when small firms require technical data to bid on solicitations, this data must be readily available for dissemination with the bid packages. In addition, any direct licensing scheme must ensure adequate opportunity for open competition among the potential licensees. The interim rule is a step in the right direction, but it does not clearly answer many small business concerns about technical data in the procurement process.

I. Specific Provisions of the Rule Are Too Complex

A. Paperwork Burdens from the Proposed Use of Standard Non-disclosure Agreements Can Be Lessened

The DAR Council recognizes that the requirements for the use of standard non-disclosure agreements may impose a significant paperwork and administrative burden, particularly on small business. Although the use of a solicitation provision in lieu of separate agreements would eliminate the paperwork burden, it may not be sufficiently protective of the proprietary interests of the originators of GPLR data. On the other hand, the paperwork flow contemplated by the interim rule is excessive and may well be reduced while still protecting contractors' proprietary interests in the data.

While replacing the non-disclosure agreement with a solicitation provision is an attractive alternative, I question whether it would adequately serve to protect the data from disclosure. This is because only those data recipients who actually submit proposals under a particular solicitation would be bound. Those who decline to submit proposals, for whatever reason, after receipt of the data package would not have agreed to the solicitation provision. Thus, since Congress has not established a separate cause of action for misuse of technical data, the originator of the data must rely on the breach of some contractual provision in order to protect its interests. This purpose is served by the standard non-disclosure agreement.

The interim rule contemplates that before a request for a technical data package containing GPLR data is granted the requestor must provide the contracting officer a fully executed standard non-disclosure agreement or a copy of a previously

executed agreement. Thus, the contracting officer is assured that every requester has agreed to be bound by the GPLR restrictions whether or not an offer is ultimately made on the solicitation. Paragraph 2 of the agreement requires, in addition, that written notice and a copy of the agreement be provided to the contractor whose name appears on the GPLR legend. This multiplies the paperwork burden by at least a factor of two. I doubt the necessity for this additional requirement.

Although not discussed in the rule's preamble, the apparent intent of this provision is to put the originator of the GPLR data on notice that the data has been disseminated and to routinely provide the identity of all firms which have received it. This would permit the originator, if it so desires, to monitor the commercial activities of the recipient to ensure that the data is not used for prohibited purposes.

This same purpose can be accomplished with significantly less paperwork burden by permitting the contracting officer to inform the data originator that the non-disclosure agreements are available from the contracting agency on request. This would reduce the initial paperwork burden by half, yet permit data originators to learn the identities of the requesters. There will be many instances where originators will have little or no interest in the fact that GPLR data has been disclosed. A requirement for routine upstream notification to the originator will have no practical utility in those situations. As long as the originator is informed that a solicitation using its data has been issued and the identities of the recipients are available on request, its legitimate interests are fully protected.

B. Definition of "Required as an Element of Performance Under A Government Contract or Subcontract" is Overly Broad

The definition of "Required as an Element of Performance Under a Government Contract or Subcontract" contains the following operative clause " ...the development was specified in a Government contract or subcontract or that the development was necessary for performance of a Government contract or subcontract." (53 Fed. Reg. 10782 (emphasis added)). This could result in a considerable expansion of the technical data covered by this regulation and will introduce unnecessary uncertainty into the technical data procurement process. The definition should read "...the development was specified in a Government contract or subcontract." with the final clause deleted.

A broad definition which involves often subjective determinations regarding what was "necessary" under a Government contract -- as opposed to that which was actually specified -- combined with the requirements for pre-award notice, post-award notice, and technical data lists, will create a monstrous paper flow and endless negotiations. Contractors will be forced to try to establish rights in any newly developed items which the Government may later claim to have been "necessary" for performance. Consequently, contracting officers will be forced to negotiate rights not only in items delivered under the contract but in items which may have a tangential relationship to the deliverable item.

For example, if a contract calls for equipment to be accurate within a certain tolerance and the contractor is forced to develop a testing device to determine if this tolerance is met, the question becomes whether the development of this testing device was "necessary" for performance. Faced with this uncertainty, a cautious and prudent contractor would apply for rights in this item, thus beginning another negotiation cycle. Due to the already heavy paperwork flow and complexity of the technical data rule this extra uncertainty should be removed.

II. Role of Data Brokers Under the Interim Rule Is Undefined

One of the ways which small firms have avoided delays in acquiring data needed to bid on government contracts has been to order the data packages from independent firms (also small businesses) known as "data brokers". Currently, data brokers are often able to provide technical data packages much faster than the government repositories. However, under the interim rule the amount of data available for data brokers may be significantly reduced. Under previous regulations brokers could obtain any data in which the Government has unlimited rights, but were not able to obtain data developed at private expense in which the government had only limited rights. However, under the interim rule unlimited rights in the government may become the exception rather than the rule, and consequently, fewer technical data packages may be available for dissemination. The standard non-disclosure agreements for Government Purpose License Rights (227.473-1(c)(2)) seem to preclude data brokers from disseminating GPLR data since this dissemination can be considered a commercial purpose. I question whether the DAR Council intended this effect.

Data brokers have served a useful purpose in assisting small businesses obtain timely access to technical data. Therefore, I believe that the final rule should not exclude data brokers from the procurement process. In fact, data brokers could serve as a valuable tool to reduce the burden on the Government of distributing technical data which is acquired with GPLR. Brokers could execute non-disclosure agreements with the

contracting activity and receive the GPLR technical data. The broker would then be responsible for securing non-disclosure agreements from potential bidders and tracking these agreements. This would reduce the burden on government to keep track of these agreements and mail out the data packages.

Therefore, I suggest that the final regulation make clear that data brokers are allowed to disseminate data acquired under GPLR as well as data with unlimited rights, and make whatever provisions may be necessary to protect the rights of the originating contractor.

III. Inherent Differences Between Government Purpose License Rights Data and Limited Rights Data Must Be Recognized in Negotiations

The interim rule has taken an overly simplistic "one size fits all" approach to data rights negotiations. As a result, the guidance does not adequately reflect the necessary distinctions between negotiations in various situations. The rule should explicitly recognize these distinctions, and more carefully tailor and simplify the procedures for negotiations.

A. Procedures for Negotiations Are Too Complex

Contracting officers are required to establish rights in data as early as possible when a contractor contributes to the development of an item or process. However, the interim rule does not clearly distinguish between negotiating for rights in data developed with mixed funding, private funding, or government funding. These rights are inherently different and different negotiation standards should apply.

For example, under Section 227.472-3(b)(2)(i)(A), describing rights in data developed exclusively at private expense, contracting officers must consider options such as "developing alternate items, components or processes" or a prime contractor's commitment to qualify additional sources, before entering negotiations. However, the interim rule also specifies that he shall not acquire rights in limited rights data unless "there is a need for disclosure outside the government" or when the cost savings of competitive procurement are greater than the cost of acquiring the data (Section 227.472-3(b)(2)(ii)(A)&(B)). At the same time, the contracting officer is instructed by Section 227.473-1(b)(2)(i) to consider the following factors (see C below) in negotiating rights: 1) acquisition strategy, 2) if the item will be competed, 3) timing of competition, 4) commercial potential for the item, 5) funding contributions, 6) alternative sources of supply, and 7) the burden on the Government of protecting the data.

These seven factors are not applicable in all negotiating situations and should be streamlined in the various sections which describe each type of rights. For example, in a limited rights situation negotiating factors number 2, 4, 5, and 7 are of little relevance and will serve only to confuse the parties and contracting officers. A more straight-forward and simple approach is warranted. In addition, the examples in Section 227.473-1(b)(2)(ii) deal with only the simplest situations and do not provide any real guidance to contracting officers. The DAR Council should attempt to consolidate all applicable negotiation factors into the sections describing each type of rights and should expand the examples to provide meaningful guidance to contracting officers.

B. Time Limitations on Data Rights

The rule includes presumptive time limitations for the expiration of limited rights and Government Purpose License Rights (227.473-1(b)(2)(iii)). I feel that the time limitation for both types of rights should be longer and that absent a strong showing of need by the government, limited rights should generally have no expiration date.

Section 227.473-1(b)(2)(iii) establishes a presumptive time period of between one and five years for expiration of both GPLR and limited rights. I do not believe these time periods should be the same, but regardless of how that issue is resolved the proposed time periods are too short. The running of this time limit begins on the estimated date of "first production delivery" to the government. Items or components which are developed with mixed funding (GPLR) normally will not be developed into commercial products simultaneously or even within a few years after the government receives its first product. Restricting the time period to an upper limit of five years would not normally allow enough time for commercial development and marketing. Many products may take three to four years to reach the market, not including time for market penetration of the product. Consequently, much data which has commercial potential will require rights for a minimum of the upper limit of 5 years. On the other hand, since this data was developed partly at government expense, some time limit is appropriate. I recommend that for GPLR the negotiated time period be extended to at least two to seven years and that extensions as described in Section 227.473-1(b)(2)(iii)(C) be granted liberally. However, the first criterion for these extensions; i.e. - "other interested parties have not requested access to the technical data;" should be deleted entirely because commercially valuable data will always induce a large number of requests for data.

In general, limited rights will attach to items or technologies which were already in existence prior to a Government contract. This is especially true for items which are subcontracted by large prime contractors to small "component" manufacturers. The interim rule correctly states that the government should only acquire rights in these items under certain circumstances. However, I see no justification for cutting off a contractor's right in these items after a certain period of time. The government can negotiate to obtain this data for reprourement purposes either through lump sum, or royalty arrangements and thus there is no need to place a time limitation on the ownership of privately developed items or technologies. Therefore, I suggest that time limits should normally only be negotiated in government purpose license rights situations.

C. Some Standards for Negotiation Do Not Reflect Balancing of Contractor and Government Interests

The seven negotiation factors in the interim rule are to be considered when determining what rights the government needs to obtain in technical data. Many of these are useful and well conceived however, three of these factors seem to present a one-sided view of the process. Section 227.473-1(b)(2)(C) calls for a determination of whether the technology can be commercialized. Recent changes in methods for transferring government-owned technology have centered around the fact that government traditionally does a poor job in evaluating which technologies have commercial potential and which do not. Therefore, it makes little sense to put this burden on contracting officers. Instead, contracting officers should solicit information from potential contractors on possible applications of the item or process rather than make such determinations themselves. Section 227.473-1(b)(2)(F) refers to the development of alternative sources of supply, in most cases where the government will repro cure an item it will be cheaper to compete that item. Finally, Section 227.473-1(b)(2)(G) calls for consideration of the government's burden for protecting data owned by contractors. Obviously this factor always will lead contracting officers to seek unlimited rights since this is the only type of rights which do not burden the government. These factors should be eliminated or better articulated to give a more balanced view of when negotiations are appropriate and how they should be conducted.

IV. Loss of Rights for Omissions from Technical Data Lists and Pre-Award or Post-Award Notifications Should Be Eliminated

Section 227.472-3(a)(1)(ix) assigns unlimited rights to the government when technical data is delivered to the government without being included on the technical data list. The

technical data list is required by clause 252.227-7013(k). However, the regulation is unclear how contractors or subcontractors will be protected from mistakes which are inadvertent but would otherwise have the effect of giving the government unlimited rights.

Several situations could arise in which, through no fault of the contractor or subcontractor, technical data does not appear on the technical data list. There seems to be no mechanism in the interim rule for assuring that contractors will submit the claims of subcontractors for ownership of technical data. Consequently, the rights of these contractors should not be subject to "sudden death" if an item in which they have a substantial investment is inadvertently left off the technical data list or notice. In fact, it is conceivable that a contractor or subcontractor could lose rights in an item developed entirely at private expense with large commercial sale potential if the data is inadvertently delivered but left off of the technical data list. Instead a procedure similar to correction of markings (227.473-3(c)) should be employed to allow correction of inadvertent omissions in submissions. I suggest that a six month grace period for this and similar situations be written into the rule.

V. Exceptions to Negotiations Should be Limited and Restrictions on Subsequent Negotiations Must be Narrowly Drawn

Section 227.473(d) allows a contracting officer to determine that negotiations are impracticable in two situations; 1) there are numerous offerors, or 2) an award must be made under urgent circumstances. These reasons seem to contemplate that negotiations will only be declared impracticable during the solicitation period (pre-award). However, this is not specifically spelled out in the regulation. I agree that when these circumstances exist negotiations may be impracticable, but these circumstance should only arise during the pre-award procurement phase not to items negotiated post-award. By not negotiating or delaying negotiations contracting officers will not be able to establish minimum government needs as required by 227.472-2 until later in the procurement process, thus unnecessarily subjecting contractors to extended periods of uncertainty. Therefore, the regulation must make clear that negotiations are impracticable only when the above circumstances are present prior to an award of the contract.

After negotiations are declared impracticable contracting officers must insert into the contract a clause "providing procedures for subsequent negotiations of the respective rights of the parties." 227.473-4(d)(1). In this situation, contracting officers should be required to include more than

just the procedures for subsequent negotiations in the contract. Important elements such as: 1) a time limit on negotiations and 2) a back-up clause should negotiations break down, must be included. The back-up clause could specify that after the time period for negotiation expires all technical data would be considered limited rights data subject to the validation procedures under Section 227.473-4. While this safeguard would clearly favor contractor ownership of data over government ownership, this policy is clearly contemplated in Section 808 and E.O. 12591. The DAR council should include these two concepts in Section 227.473-1(d)(1) of the final rule.

VI. Technical and Drafting Changes

A. The Definition of "Government Purposes" is Overly Broad

In Section 227.471 the definition of Government Purpose License Rights includes a description of government purposes:

"Government purposes include competitive procurement, but do not include the right to have or permit others to use technical data... for commercial purposes." This definition has two deficiencies. First, it is incorrectly worded and second, it is vague. The definition should be changed to read:

"Government purpose include competitive procurement, but do not include the right to use or permit others to use technical data...for commercial purposes." (new language underlined). In addition, the definition provides no guidance on what other activities might be considered government purposes. The DAR Council should expand this definition and provide more examples of "government purposes".

B. Balancing of Interests Misstates Government Interests In Competitive Reprocurement

Section 227.472-1(c)(2) reads "When the Government pays for research and development, it has an obligation to foster technological progress through wide dissemination of the information and where practicable, to provide competitive opportunities for other interested parties." The last clause in this section should be changed to more strongly reflect the pro-competition dictates of the Competition in Contracting Act (P.L. 98-369). The section should read "When the Government pays for research and development, it has an obligation to foster technological progress through wide dissemination of the information and to the greatest extent possible, to provide competitive opportunities for other interested parties." (new language underlined).

C. Standard Non-disclosure Agreements

Under the interim rule standard non-disclosure agreements will provide the mechanism to protect the originating contractors rights. However, sub-section (2)(i) reads "This Agreement must be executed by an official authorized to bind the contractor." The word "contractor" is too narrow to bind all potential users of the data. The word "contractor" should be changed to "recipient" in order to correct this unintended limitation.

D. Subcontractor Should Be Added to Section 227.473-2

Section 227.473-2 contains the general prohibitions from Section 808 of P.L. 100-180 against relinquishing rights in data developed at private expense. However, subsection (b)(1)(ii) should read "To refrain from offering to use or using, an item, component, or process to which the Contractor or subcontractor is entitled to restrict the Government's rights in technical data under 10 U.S.C. 2320(a)(2)(B)" (new language underlined). This change will make clear subcontractors have rights in technical data which may be independent of the prime contractor.

E. Contractors Must Receive Notice of Non-conforming Markings

When technical data is delivered with incorrect restrictive markings Section 227.473-3(e) allows the government to use the data according the correct markings and requires the contractor to correct these markings. However, there is no requirement in that section for the government to notify the contractor of the incorrect markings. Therefore, subsection (e) must be rewritten to require the government to give notice of incorrect markings and to distinguish this from a challenge under section 227.473-4(a).

F. Pre-challenge Requests for Information Must Be Limited in Scope and Allow A Reasonable Time to Respond

The validation procedures for technical data include a pre-challenge request for information by a contracting officer. I support this concept because it will allow contracting officers to check the facts before initiating a challenge to markings on technical data. However, the scope of this inquiry should be limited to two areas; first, details about the development of the item or process, and second, details about the funding used for the development. In addition, Section 227.473-3(b)(1) states "The contracting officer should provide a reasonable time for submission of the required data." This statement must be modified to read "The contracting officer shall provide a reasonable time for submission of the required data." A reasonable time frame would be four to six weeks.

VII. The Initial Regulatory Flexibility Analysis is Deficient in Several Areas and Does Not Follow DAR Council Procedures

I am pleased that the DAR Council has performed an Initial Regulatory Flexibility Analysis (IRFA), however, the analysis which was performed does not address several important issues, such as paperwork burdens and impacts on data brokers. Where the IRFA does address the issues, it does not adequately explain the DAR Council's rationale for the alternative chosen. Finally, the impact of this rulemaking is primarily its paperwork burden and the DOD has not made the paperwork clearance package available to the public so that these impacts can be evaluated. Therefore, the public does not have all of the information necessary on the impacts of the rule to make informed comments on the various regulatory alternatives.

In February, 1987 the CAAC and DAR Council developed joint operating procedures for complying with the RFA. The IRFA performed on the interim rule did not follow these procedures. As noted above, Advocacy's main concern with the rule is its complexity and the paperwork burden on small entities of complying with the rule. While the rule's impact is difficult to quantify, the general descriptive statements permitted by Section IV(A)(8) of the guidelines, do not address or describe how this rule has been consolidated or simplified as required in IV(B)(6)(b) of the guidelines. In addition, the reporting and recordkeeping requirements were not adequately described or analyzed. As a comparison, the DAR Council performed a much better analysis of the impact of the implementation of Section 1207 of Public Law 99-661.

Section IV(B)(3) of the guidelines describe procedures for conducting a final regulatory flexibility analysis (FRFA). The guidelines require: "A description of each of the significant alternatives to the rule considered and why each was accepted or rejected." (Section IV(B)(3)) The DAR Council should fully address all alternatives it is considering in the final rule, not just those listed in its initial regulatory flexibility analysis. In addition, the Council should provide several elements which were missing from the IRFA: 1) an estimate of the number of small firms affected; 2) a more accurate characterization of the affected firms; and 3) estimates of the cost and skills required of small firms to comply with the paperwork associated with the final rule.

Conclusion

Despite the tight deadline for compliance with Section 808, the DAR Council's interim rule addresses most of the complex and conflicting concerns of contractors and the Government. Advocacy supports the concept of contractor ownership of technical data, but changes in the interim rule must be made in order to keep the complexities of contractor ownership from overwhelming the goals of the Competition in Contracting Act. I urge the DAR Council to adopt the changes suggested in these comments and any other changes which will help accomplish this purpose.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Frank S. Swain".

Frank S. Swain
Chief Counsel for Advocacy



DYNAMIC CONTROLS CORPORATION

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87-303

May 25, 1988
RJK-88-028

Defense Acquisition Regulatory Council
The Pentagon
Washington, DC 20301-3062

Attention: Mr. Charles W. Lloyd, Executive Secretary
ODASP(P) DARs, c/o OASD (P&L) (MRS)
DAR CASE 87-303

Gentlemen:

This letter is to advise that Dynamic Controls Corporation endorses the Proprietary Industries Association's comments to the new interim DOD data rights regulations effective 4/04/88.

Of particular concern are the new definitions at 227.471 of "Developed Exclusively with Government Funds", "Developed Exclusively at Private Expense", and "Required as an Element of Performance Under a Government Contract or Subcontract". The definitions completely ignore private development if the data was every included as a contract requirement in any contract or subcontract. Since the definitions provide the foundation for all subsequent regulations, it is essential that the definitions fully recognize private expense development under all circumstances.

Very truly yours,

DYNAMIC CONTROLS CORPORATION

Ronald J. Kowalski
Marketing Manager

RJK/pap

cc: Bettie McCarthy
733 15th Street, NW, Suite 700
Washington, DC 20005



ENERGY RESEARCH CORPORATION

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87-303
5/31/88
87-303

May 27, 1988

Defense Acquisition Regulatory Council
Attn: Mr. Charles W. Lloyd, Executive Secretary
ODASD (P) DARS
c/o OASD (P&L) (MRS)
Room 3D139
The Pentagon
Washington, DC 20301-3062

Reference: DAR Case 87-303
DAR Case 88-610

Dear Mr. Lloyd:

This letter provides clarifications and further background for the questions raised by ERC's letter to you of May 6, 1988. Discussions between Mr. R. Summerour of the DAR Council Technical Data Committee and the undersigned, suggested the need for this letter.

ERC's concern is that the Interim Rule, 53 FR 10780 of April 1, 1988, on Rights in Technical Data, should be clarified to affirmatively set forth the rights of contractors to commercially use, sell or dispose of the rights which contractors retain in the results of government or mixed-funded research.

It is understood that security requirements may restrict commercial use of military technology. It is also clear that license agreements may not restrict the use of technology so as to violate anti-trust laws.

An issue that has arisen at ERC is whether the government becomes a participant in any income or profit derived from the sale or license of the technical data where ERC solely, or jointly with the government, possesses rights of use, sale etc., in technical data. Naturally, the government has a contractual right to recover non-recurring costs on commercial sales when the provisions of DOD FAR Supplement Part 35.71 apply. But absent those provisions, ERC understood that each party, the government and ERC, could not restrict the use or disposition of the other's rights, except to the extent limited by contract.

ENERGY RESEARCH CORPORATION

ERC has encountered a contrary and we believe unique interpretation on the part of our local DCAA. Since May of 1986, DCAA has made clear to ERC (through correspondence and audits) their opinion that the government is entitled (as a dollar for dollar reduction to G&A expenses) to share in all license income earned by ERC which may have resulted from technology developed under government Contracts, or ERC's IR&D. DCAA cited DOD FAR Supplement Part 35.71 as further support for this position, though not applicable to any ERC contracts.

DCAA feels that costs associated with license income should not be charged to government contracts, either directly or indirectly, or to IR&D. DCAA has not defined what they mean by costs associated with license income. By seeking to deduct all license fees income from IR&D and G&A expenses, DCAA has implied that the government owns all the rights to the technology which is licensed independent of the contractor's rights to use the technology. DCAA has essentially asserted that the government is a partner in any profit from licensing of technology developed under government funded and mixed-funded efforts. Nor does DCAA consider IR&D costs to be a private expense. If we are in error, then the right of the government to participate in profit or income derived by a contractor from technology developed by government funded, mixed-funded or private efforts is not limited to licenses. It would include profits or income from any source, such as the sale of any products incorporating the technology. Based on ERC's experience the provisions of DFARS 35.71 would seem to cover the matter, but apparently not clearly enough.

For the above, reasons, we have suggested clarification is in order. The purpose of this letter is not to obtain an adjudication between ERC and DCAA. It is to point out that the present regulation has been misinterpreted by DCAA on a continuing basis. Clarification of the regulations will avoid a recurrence in the future. Rights to use technical data and know-how for commercial purposes should be concisely explained along with appropriate limitations such as security, anti-trust, and DFARS 35.71 provisions.

Your responsiveness has been appreciated. If you need anything else, please call the undersigned.

Very truly yours,



Ross M. Levine
Contract Administrator



**Shipbuilders
Council of
America**

1110 Vermont Avenue, N.W.
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202-775-9060

May 31, 1988

Dear Mr. Lloyd:

Subject: DAR Case 87-303

The Shipbuilders Council of America submits this letter in response to the request for comments on the Department of Defense interim rule to implement section 808 (Rights in Technical Data) of Public Law 100-180. The Council is the national organization representing principal domestic shipbuilders, ship repairers, and the vendors of equipment and services to those industries.

GENERAL COMMENTS

In several places, technical data are referred to in a context which would seem to include computer software, but computer software is not referred to specifically. Several of these, but probably not all, are pointed out below. We suggest the regulation should be combed for all such occurrences of either term, and the other added where appropriate.

This regulation on technical data, computer software and copyrights is becoming unmanageable. It is so long, complex and filled with so many nuances and subtleties that it will soon require one person per company full time to keep track of changes and to administer the clauses in several contracts. We question whether the imposition of ever increasing paperwork burdens on all contractors and subcontractors will increase the cost of all items to the Government far beyond the cost increment the Government perceives it is paying for what it considers noncompetitive procurements.

SPECIFIC COMMENTS

227.471 Definitions

1. The change, putting the definitions in the contract clause (252.227-7013), is a good one. It eases contract administration not to have to refer to a second document for something as important as definitions of terms.
2. "Developed Exclusively with Government Funds - refers to "item, component, or process" but not "computer software." Granted, no instance could be found in the policy or the clauses referring to computer software developed exclusively with Government funds, so maybe there is no need to refer to computer software in this definition. But it certainly seems odd that in a policy dealing with

rights in "Technical data, Other Data and Computer Software, and Copyrights", and especially in a clause (252.227-7013) entitled "Rights in Technical Data and Computer Software," one may speak of technical data developed exclusively with Government funds, but omit any reference to computer software developed exclusively with government funds. Was this intentional?

3. "Developed Exclusively at Private Expense"

A. Again, this definition does not refer to computer software. Yet, some places in the policy -- for example 227.481 (we assume this subpart is carried over unchanged in the proposed policy) -- refer to "computer software developed at private expense." The clause at 252.227-7013(c)(i)(iii) refers to commercial computer software, etc. "developed at private expense." The clause 252.227-7038(a)(1)(i) refers to computer software developed exclusively at private expense. These inconsistencies should be cleared up.

B. Insert "directly" after "paid for" in the first sentence. This is obviously what is intended, and without it the definition is almost as vague as the term it is attempting to define.

C. The part of the definition beginning, "Independent research..." to the end should be deleted and the following substituted:

"Items components or processes and computer software for which the costs of development are charged as indirect costs against Government contracts or a Government contract shall not be considered as paid for directly by the Government, such indirect costs specifically include, but are not limited to, independent research and development and bid and proposal costs as defined in FAR 31.305-18 (whether or not included in a formal independent research and development program)."

This one sentence overcomes the following objections to the proposed definition:

a. The sentence beginning "All indirect costs..." is not needed because if development was required as an element of performance in a Government contract or subcontract, then the item comes under the definition of "Developed Exclusively with Government Funds."

b. It goes some way toward defining "indirect costs," rather than introducing a new term whose meaning is not entirely clear from the context.

c. The proposed definition has an air of being tacked together (which it has been). The substitute integrates and rationalizes the concepts of indirect costs and IR&D and B&P costs, making obvious that IR&D and B&P costs are types of indirect costs.

- d. The sentence in the proposed definition beginning, "Indirect costs are considered funded at private expense..." has the fatal flaw that it uses the term it is attempting to define.
 - e. It meets the objective of simplifying and streamlining subpart 27.4.
4. "Required as an Element of Performance Under a Government Contract or Subcontract" - If ever a term stood on its own, needing no further elaboration, this is one. It has been used since time immemorial in these policies with no need of definition. The purpose of its addition now is obvious: to extend the plain meaning of the words to encompass "development [that] was necessary for performance of a Government contract or subcontract." These words subvert the plain meaning of the term "required as an element of performance," and amount to overreaching. The Government should be satisfied with getting what it specifically asks for, without forcing a contractor to relinquish rights to a tool, a method or computer software that it considered necessary for performance of a contract. These may have been developed on its own account in anticipation of what it hoped would be a series of contracts. The words as they stand could cover, for example, special facilities for handling nuclear waste. These would be "necessary for performance" of a nuclear refueling contract, and under the broad reach of the definition, the contractor could be forced to relinquish technical data on the facilities for the benefit of his competitors.

227.472-3 Rights in technical data

(a)(1)(ii) This uses the term "specified as an element of performance...." How does this relate to the DFARS definition of "Required as an Element of Performance..."?

(a)(1)(ix) By this policy, a contractor relinquishes rights in technical data which are delivered without being identified in a list made part of the contract. The general requirement embodied here and in various other parts of the policy and clauses, to list in advance as part of the contract all technical data which will be furnished with other than unlimited rights, is impossible to fulfill in many cases. A prime contractor for construction of a new submarine, for example, can anticipate having thousands of subcontractors. It is impossible to know in advance who these will be, and which ones plan to submit such data.

The drafters of the policy apparently recognize this because they attempt to provide in 227.473-1(a)(3) and 252.227-7013(j) for "postaward notification" of use of items for which technical data may be submitted with other than unlimited rights, and for bilateral

modification of the contract [at section (c)(1)(ii)] to include such technical data. But we question the wisdom of such a policy. If it is enforced rigorously, it will increase the cost of the product to the Government to accommodate the need for frequent contract modifications as each subcontractor steps forward with his proprietary technical data. It is another step away from the realities of the marketplace.

We also believe the regulation should address the subject of rights in technical data when a prime contractor receives substantial quantities of technical data from subcontractors. We would propose the following language to address this subject.

- (a)(3) "Where data is acquired from a subcontractor through the flowdown of the applicable clause, a prime contractor or higher tier subcontractor will have an interest in the use of the data to the same extent as the Government itself. Therefore, where the Government itself is entitled to unlimited rights in data, its prime contractors and higher tier subcontractors are entitled to unlimited rights in these data for the performance of their contracts."

In our view, the above language does not work a substantive change in the law, but simply addresses a situation which has not been squarely faced in the past. Therefore, it has been a bone of contention between prime contractors and their subcontractors.

227.473-1 Procedures for establishing rights in technical data

- (a)(4)(ii) This requirement [invoked in 252.227-7038(a)(1)(iii) and (iv)] to list in advance in the contract and certify costs of development of items for which data will be submitted with other than unlimited rights will increase the cost of the product to the Government even further than the "mere" requirement to list the items referred to under 227.472-3 above. In a very real way, it adds insult to injury. Formerly, this information was required only if the contractor's assertions were challenged under 252.227-7037. Now it must be provided as a matter of course and incorporated in the contract. It makes the process even more adversarial; adding an air of, "We don't accept your bare assertions; now you must prove them with numbers." An immediate, practical problem with the requirement is that a contractor may long ago have discarded records of costs of development of an item which he has managed to keep proprietary. What will be the effect if he cannot provide the information?

The larger problem is that it will add to the contractor's cost of doing business -- and ultimately to the cost of the product to the Government -- for no

good reason. The genesis of this requirement obviously is the perception that the Government is been taken to the cleaners on reprourement. At least one study (Office of Secretary of Defense Technical Data Rights Study Group, 22 June 1984, quoted in Government Contractor Briefing Papers No. 88-2, February 1988, "Government Rights in Data & Software") has concluded that this is not a large problem, that only 3% of spare parts acquisitions had been made from a sole source because of limited data rights. We would expect that the increased cost to the Government of requiring all these extra data on every contract from every supplier who has proprietary data will outweigh the (perceived) extra costs of sole source procurement.

The worst aspect of this situation is that the Government position is founded on the supposition that most of the sole source providers are cheating. If many of them are cheating, which seems unlikely, then maybe the savings from increased competition will exceed the extra costs of ferreting them out. But even that is a doubtful proposition. If most of them are not cheating, then the only effect of these new requirements will be to increase paperwork and costs. The sole source providers will still assert their proprietary rights and name their own price, now inflated by these additional costs.

There are two very undesirable side effects of this process which are difficult to quantify, but which should be considered. One is that many suppliers who have the choice will opt out of Government contracting not only because they do not want to have to reveal cost information, but because they are daunted by the sheer volume of dense regulations they must deal with. The other consideration is that as these regulations become more and more onerous, the cost of making innovations and maintaining them as proprietary goes up and many entrepreneurs will be discouraged from even trying.

227.473-1 Procedures for establishing rights in technical data

- (a)(3) This policy statement says the clause at 252.227-7013 requires the contractor to notify the contracting officer "prior to committing to the use" of items, etc., for which technical data will be submitted with other than unlimited rights. Yet the language of that clause at section (j) can not be read to require prior notice. It requires notification merely of "use."
- (c)(1)(i) This paragraph speaks of a "list of any items, components, processes (and rights therein), to be delivered with other than limited rights." This

apparently has gotten garbled. The technical data would be delivered with other than unlimited rights, not the items.

(c)(2)(i)

through (iii)

On balance, the alternative to the Standard Non-Disclosure Agreement for GPLR data proposed in the background section seems preferable, especially from the standpoint of the Government. It would make the contracting process much less cumbersome, yet should protect adequately the rights of the proprietor of the data provided the notice in the solicitation is sufficiently conspicuous and the legend on the data itself gives sufficient notice. If the legend to be used on the data is that specified in 252.227-7013, changes are in order; that legend does not give sufficient notice. (See elsewhere in these comments.)

227.473-3 Marking and identification requirements

(c)

This section states the policy that a contractor has six months to correct the omission of restrictive markings on technical data. We can find no place in the clauses, however, that informs the contractor or subcontractor of this. In view of the repeated requirements in the clauses that all data submitted with other than unlimited rights must be listed in advance, etc., we consider this a serious omission. This is especially true for smaller subcontractors who may not be as familiar with DFARS policy as large contractors.

252.227-7013 Rights in technical data and computer software

(b)(2)

This clause should require the Government to forward to the contractor a copy of any Standard Non-Disclosure Agreement under which the Government licenses GPLR data to a third party. This burden should be on the Government as licensee; the Government should not put the burden on the sublicensee as is done in the Standard Non-Disclosure Agreement [227.473-1(c)(2)(iii) in paragraph (2)].

The GPLR legend required by this section is seriously deficient in referring to "restrictions...set forth in...paragraph (a)(14) above." The person receiving an item of technical data will have only the legend, he will not be able to refer to "paragraph (a)(14) above." It is doubtful such a notice would ever be deemed sufficient.

This legend question has gotten completely out of hand. All the legends proposed in this regulation are so long and complex -- even where they refer to another document -- and depend on such specialized

terms that:

- o fitting them on a drawing, for example, has become a daunting task; and
- o they facilitate the argument that they are so complex and confusing as to be meaningless to the ordinary person.

We urge that a thorough assessment, with a reappraisal of the purpose of the legends, be made with the object of simplifying and perhaps unifying them. The legend should not refer to another document.

- (b)(3)(i) This paragraph refers to "data in the categories in (a)(1) above." This reference does not make sense. (a)(1) above is the definition of "Commercial Computer Software." Should the reference be to "(b)(1(ii through ix) above"? [Note that a reference to (b)(1) above would not be proper as the category of (b)(1)(i) is included by the language "developed exclusively at private expense" in (b)(3)(i).].
- (b)(3)(iii) Another common fault with all the legends in this clause, evident particularly in the Limited Rights Legend, is that it is difficult to tell where the legend begins and ends. The legend should be set off as by indenting it. This is especially necessary where directions to the contractor occur in the middle of the legend.
- (f)(2) The first sentence of this paragraph makes absolutely no sense.
- (j) It is assumed this paragraph is referring to items, etc. for which technical data will be submitted with other than unlimited rights. This should be made explicit.

252.227-7018 Restrictive markings on technical data

Does this clause apply to restrictive markings on computer software? If so, this should be made explicit.

- (b)(3) We question the need for this requirement, especially in view of the potential for abuse, unwarranted harassment of subcontractors, etc. Also, the clause itself at (f) provides for direct pass down to subcontractors, the subcontractors then standing in place of the contractor. The subcontractor may deliver data with other than unlimited rights directly to the Government. In these circumstances, it would be more appropriate for the Government to police its contract requirements.

(b)(4)

We object strongly to the requirement for contractors to maintain procedures and physical security for protection of their proprietary technical data (and computer software?). This is completely unnecessary. Defense contractors, by and large, already have such measures in place. It is these very measures to protect their economic livelihood, in fact, that are the *raison d'être* for the very policies at issue here. The adequacy of such measures is a matter of concern only to the proprietor of the data, not to the Government.

Why is such a requirement necessary now after all these years of operating under these regulations without it? Furthermore, this paragraph speaks of protecting "technical data... from inadvertent or unauthorized marking..." That is the purpose of section (a) of this clause, however, and if the section stands the redundancy should be eliminated by deleting the four underlined words.

252.227-7027 Deferred ordering, of technical data or computer software

In the eleventh line of this clause, should "generated" be "developed"? The second is defined, the first is not.

252.227-7028 Requirement for technical data certification

The reference to 227.473-4(a) is wrong. The reference should be 227.473-1(a)(4)(i).

252.227-7035 Preaward notification, of rights in technical data and computer software

In section (a)(3), "for" should precede "which." In section (b) reference is made to "(a)(ii) above." Should this be "(a)(2) above"? In section (c) offerors are required to furnish, at the request of the Contracting Officer, evidence to support an assertion of other than unlimited rights. In the April 1987 DFARS, the policy [at 227.473-1(a)] states, "The contracting officer should not request supporting evidence unless..." an agreement is intended. The new policy does not provide this balancing provision, at least that we can find. If it does, fine; if it does not, it should.

252.227-7038 Listing and certification, of development of technology with private funding

The reference to 227.473-1(a)(4) would be better as 227.473-1(a)(4)(ii), since 227.473-1(a)(4)(i) contains a reference to a clause other than 7038.


See the comments above under 227.473-1.

(a)(2) The words "subject to" should be replaced by "with." This is consistent with usage elsewhere. The concepts

"subject to" and "unlimited rights" are antithetical.
If you have unlimited rights, are you "subject to"
anything?

The Council appreciates this opportunity to comment on the interim rule. We hope the DAR Council will find our comments of assistance in formulating the final rule on rights in technical data.

Sincerely,


John J. Stocker
President

Mr. Charles W. Lloyd
Executive Secretary
OASD (P&L)(MRS), Room 3D139
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May 31, 1988

Defense Acquisition Regulatory Council
Attn: Mr. Charles W. Lloyd
Executive Secretary
ODASP(P) DARs, c/o OAD+SD (P&L)(MRS)
DAR CASE 87-303

The Pentagon
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

Enclosed are the comments of the Proprietary Industries Association with the recommended changes to DAR CASE 87-303. The opportunity to comment is appreciated.

The Proprietary Industries Association represents over 80 defense subcontractors who use private funds to finance the development and manufacture of their products. PIA member companies view their proprietary technical data as valuable company assets. For that reason, these regulations are of paramount importance to them.

From a practical point of view, PIA is concerned that the interim rule on rights in technical data will not improve contracting practices on this sensitive issue. From the perspective of the private expense developer the rule creates additional risks of losing legitimate proprietary rights and makes an adequate return on the investment in innovation more uncertain. The definitions of "developed exclusively with government funds", "developed exclusively at private expense" and "required as an element of performance" raise more questions than they answer and subordinate the source of funding test to the point that limited rights may not be sustained even when 100% of development funding was furnished from private funds.

The certifications and listing procedures provide subcontractors with numerous opportunities to lose rights in technical data by administrative means, as do the authorities granted the contracting officer to set the timetable for negotiations. The administrative burdens imposed will increase overhead costs for contractors and subcontractors alike.

EXCC SEC
87-303

Because the rule is constructed to give guidance on implementing acquisition plans with respect to the need for disclosure of technical data outside the government, the contracting officer has no guidance and no incentive to implement the prohibitions which protect rights in technical data pertaining to private expense development.

Finally, for subcontractors who develop at private expense, there is no certainty as to who will be negotiating their rights in technical data, and whether or not they can protect background technology developed at private expense.

The net result is to make the investment in private expense development for defense more unattractive. The loss of private investment in defense related innovation is likely to impair the ability of the Services to perform their mission.

Preliminary findings of economic research now being conducted at Caltech support these predictions. Given private funding of development and use of fixed price contracts with government, the fact of yielding procurement rights in technical data will result in fewer commercial companies participating in the market, a decline in the aggregate investment of those companies in development for defense, and higher unit prices for defense over time as fewer competitors participate. The impact on private expense developers, will be similar, given these assumptions.

From a policy point of view, we believe that the interim regulations on rights in technical data are inadequate for a number of reasons:

- o The regulation fails to implement its stated policy of obtaining only the minimum essential rights in technical data and technical data and to use the least intrusive method of obtaining rights in technical and/or technical data;

- o The regulation imposes paperwork and record keeping burdens that are excessive, and failure to comply may result in the loss of rights in technical data;

- o The regulation does not reflect a balancing of interests as Congressional direction requires; and

- o The regulation fails to implement Executive Order 12591 in a meaningful way; and

- o The regulation does not reflect the recommendations of the President's Blue Ribbon Commission on Defense Management.


PIA concurs with CODSIA. The DAR Council must substantially re-write the April 1 coverage to bring it into compliance with

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the law, the President's Executive Order, and the policy statements which serve as a predicate for the regulations. The enclosed, line-in, line-out of the interim regulation is submitted as a baseline for such a revision.


The opportunity to discuss these concerns at a future date would be welcome. As a point of departure, PIA's priority concerns are summarized in the enclosed.

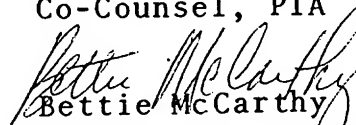
Sincerely,


Doug Longyear
President, PIA



H. "Bud" Hill
Co-Counsel, PIA


Bob Brunette
Co-Counsel, PIA


Bettie McCarthy
Washington Representative, PIA

MAJOR CONCERNS

- (1) The new definitions of "Developed Exclusively with Government Funds" and "Developed Exclusively at Private Expense" and "Required as an Element of Performance" literally ignore the source of funding of development if the data pertains to a contract requirement in any contract or subcontract.
- (2) The rule allows for the Contracting Officer to require negotiation of a proposal's proprietary data assertion. A single group of negotiation "factors" are used, irrespective of the source of funding (private expense, mixed or Government funding). This will work to the disadvantage of the private expense developer and the government. The factors do not guide the contracting officers to consider the disincentives to private funding of development when negotiating to obtain greater rights. See 227.473-1(b)(2).
- (3) These regulations have deleted the ability to agree in a subcontract (via a Schedule agreement) that a subcontractor is authorized to make proprietary data with Limited Rights legends. Now, the only way to establish entitlement is to prove development at private expense (using DoD definitions that ignore source of funding.) See 227.472-3(b) and Clause 252.227-7013(b)(3).
- (4) A prime contract "list" of proprietary data is now established to become the definitive statement of rights in technical data for deliverable technical data. Failure to be included on the "list" can result in a loss of rights. Further, no means for a subcontractor to see the list or insure he is on the list is provided and the subcontractor is not a party to the bilateral modifications necessary to amend the list postaward of the prime contract. Inclusion on the list should simply be a matter of notice and substantive "penalties" for administrative procedures should be eliminated.
- (5) The Government has the option to delay negotiating rights in technical data until after award of the contract or subcontract (or delay acceptance of the item on the "list"). If the parties cannot agree within a time frame established by the prime contract, then the contracting officer can unilaterally apportion rights in technical data. The subcontractor has no right of appeal under this provision and the government can establish greater than limited rights for itself in privately developed items.
- (6) If the government negotiates with a higher tier contractor and in any way binds that higher tier contractor to deliver greater-than-limited rights in

anything but that contractor's technical data, then the statutory prohibition at 10 USC Sec. 2320(a)(2)(F) becomes impossible to enforce and may result in a loss of legitimate proprietary rights in technical data. This can do nothing but create tension between lower and higher tier contractors. To be consistent, the prime contractor should not be responsible for certifying subcontractor certification and marking procedures, and the government should negotiate directly with the party asserting the rights in technical data to obtain greater rights than it could otherwise receive.

- (7) The Government's right to challenge restrictive markings is three (3) years from the Government's receipt of the data, and no effective appeal process is provided. See 227.473-4(a) and 225.7037(h).
- (8) Failure to respond to a prechallenge request is interpreted to give the DoD reasonable grounds to formally sent a validation challenge, contrary to law. See 227.473-4 and Clause 252.227-7038(c).
- (9) The regulations fail to affirmatively bless the least intrusive method of obtaining competitive sources of supply i.e. direct licensing as an alternative to obtaining greater rights in technical data Sec. 808 of P.L. 100-180 specifically legitimizes this alternative.
- (10) The certification procedures should be deleted in their entirety or at a minimum, be made part of the notice of intent to submit technical data with less than unlimited rights.
- (11) Placing time limits on Government Purpose License Rights will not work to encourage commercialization to the maximum practical extent and in fact, arbitrarily places time limits on technical data pertaining to items, components or processes developed at private expense if negotiated in mixed funding situations. This argues for a requirement to negotiate directly with the party asserting the right, and for placing a more flexible rule on GPLR.
- (12) The "Special Works" clause at 252.227-7020 permits the government to acquire title in technical data as opposed to data rights where no Special Work is involved. The clause should be amended to apply only to Special Works.

PART 227 - PATENTS, DATA AND COPYRIGHTS

2. Subpart 227.4 is revised to read as follows:

SUBPART 227.4--TECHNICAL DATA, OTHER DATA, COMPUTER SOFTWARE, AND COPYRIGHTS

<u>Sec.</u>	
227.470	Scope.
227.471	Definitions.
227.472	Acquisition Policy for Technical Data and Rights in Technical Data.
227.472-1	General.
227.472-2	Establishing Minimum Government Needs.
227.472-3	Rights in Technical Data.
227.473	General Procedures.
227.473-1	Procedures for Establishing Rights in Technical Data.
227.473-2	Prohibitions.
227.473-3	Marking and Identification Requirements.
227.473-4	Validation of Restrictive Markings on Technical Data.
227.473-5	Remedies for Noncomplying Technical Data.
227.473-6	Reserved.
227.474	Reserved.
227.475	Other Procedures.
227.475-1	Data Requirements.
227.475-2	Deferred Delivery and Deferred Ordering.
227.475-3	Warranties of Technical Data.
227.475-4	Delivery of Technical Data to Foreign Governments.
227.475-5	Overseas Contracts With Foreign Sources.
227.475-6	Reserved.
227.475-7	Reserved.
227.475-8	Publication for Sale.
227.476	Special Works.
227.477	Contracts for Acquisition of Existing Works.
227.478	Architect-Engineer and Construction Contracts.
227.478-1	General.
227.478-2	Acquisition and Use of Plans, Specifications, and Drawings.
227.478-3	Contracts for Construction Supplies and Research and Development Work.
227.478-4	Reserved.
227.478-5	Approval of Restricted Designs.
227.479	Small Business Innovative Research Program (SBIR Program).
227.480	Copyrights.
227.481	Acquisition of Rights in Computer Software.
227.482	Reserved.

Subpart 227.4--TECHNICAL DATA, OTHER DATA, COMPUTER SOFTWARE, AND COPYRIGHTS

227.470 Scope.

This subpart sets forth the Department of Defense policies and procedures relating to the acquisition of technical data and computer software as well as rights in [procured] technical data, other data, computer software, and copyrights. This part does not apply to rights in computer software acquired under GSA schedule contracts.

227.471 Definitions.

"Commercial computer software", as used in this subpart, means computer software which is used ~~regularly~~ for other than Government purposes and is sold, licensed, or leased ~~in significant quantities to the general public[.] at established market or catalog prices.~~

"Computer", as used in this subpart, means a data processing device capable of accepting data, performing prescribed operations on the data, and supplying the results of these operations; for example, a device that operates on discrete data by performing arithmetic and logic processes on the data, or a device that operates on analog data by performing physical processes on the data.

"Computer data base", as used in this subpart, means a collection of data in a form capable of being processed and operated on by a computer.

"Computer program", as used in this subpart, means a series of instructions or statements in a form acceptable to a computer, designed to cause the computer to execute an operation or operations. Computer programs include operating systems, assemblers, compilers, interpreters, data management systems, utility programs, sort-merge programs, and ADPE maintenance/diagnostic programs, as well as applications programs such as payroll, inventory control, and engineering analysis programs. Computer programs may be either machine-dependent or machine-independent, and may be general-purpose in nature or be designed to satisfy the requirements of a particular user.

"Computer software", as used in this subpart, means computer programs and computer data bases.

"Computer software documentation", as used in this subpart, means technical data, including computer listings and printouts, in human-readable form which: (a) documents the design or details of computer software, (b) explains the capabilities of the software, or (c) provides operating instructions for using the software to obtain desired results from a computer.

"Data", as used in this subpart, means recorded information regardless of form or method of recording.

"Detailed design data", as used in this subpart, means technical data that describes the physical configuration and

performance characteristics of an item or component in sufficient detail to [enable] ~~ensure that~~ an item or component produced in accordance with the technical data will [to] be essentially identical to the original item or component.

"Detailed manufacturing or process data", as used in this subpart, means technical data that describes the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

"Developed", as used in this subpart, means that the item, component, or process exists and is workable. Thus, the item or component must have been constructed [in nearly ever case] or the process practiced. Workability is generally established when the item, component or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended [and may occur either prior to, or under the contract and is not considered a part of its development.]. Whether, ~~how much,~~ ~~and what type of~~ analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered "developed", the item, component, or process need not be at the stage where it could be offered for sale or

~~sold on the commercial market~~, nor must the item, component or process be actually reduced to practice within the meaning of Title 35 of the United States Code.

"Developed Exclusively with Government Funds", as used in this subpart, means, in connection with an item, component, process, that the [direct] cost of development was ~~directly~~ paid for in whole by the Government [and] ~~or that the development was required~~ [specified] as an element of performance under a Government contract or subcontract.

"Developed Exclusively at Private Expense", as used in this subpart, means, in connection with an item, component, or process, that no part of the [direct] cost of development was paid for by the Government[.] ~~and that the development was not required as an element of performance under a Government contract or subcontract.~~ Independent research and development and bid and proposal costs, as defined in FAR 31.205-18 (whether or not included in a formal independent research and development program), are considered to be at private expense. Indirect costs are considered funded at private expense. ~~All indirect costs of development are considered Government funded when development was required as an element of performance in a Government contract or subcontract. Indirect costs are considered funded at private expense when development was not required as an element of performance under a Government~~

~~contract or subcontract~~. [When, in applying these criteria, the entire item, component or process doesn't qualify as "Developed Exclusively at Private Expense", then separate elements thereof which do meet the criteria shall be deemed to qualify; such a separate element can be an existing conceptual design which is focal to the workability of the item, component or process.]

"Form, fit, and function data", as used in this subpart, means technical data that describes the required overall physical, functional, and performance characteristics, (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

"Government purpose license rights", (GPLR), as used in this subpart, means [the Government may] ~~rights to use~~, duplicate, or disclose data [to a licensee according to the terms of its license] (and in the SBIR Program, computer software), in whole or in part and in any manner, for Government purposes only, and to have or permit ~~others~~ [the licensee] to [utilize such data] ~~do so~~ for Government purposes only. Government purposes include competitive procurement, but do not include the right to have or permit [licensees] ~~others~~ to use technical data (and in the SBIR Program, computer software) for commercial purposes.

"Limited rights", as used in this subpart, means rights to use, duplicate, or disclose technical data, in whole or in part, by or for the Government, with the express limitation that such technical data shall not, without the written permission of the party asserting limited rights, be: [(i)] released or disclosed outside the Government; [(ii)] used by the Government for manufacture, or in the case of computer software documentation, for preparing the same or similar computer software; or [(iii)] used by a party other than the Government, except when:

(a) Release, disclosure, or use is necessary for emergency repair or overhaul; [where the item, component or process concerned is not otherwise reasonably available to enable timely performance of the work] provided that the release, disclosure, or use outside the Government shall be made subject to a [written] prohibition against further use, release, or disclosure, and that the party asserting limited rights be [promptly] notified [in writing] by the contracting officer of such release, disclosure, or use [and receive a copy of the nondisclosure agreement]; or

(b) Release or disclosure to a foreign Government that is in the interest of the United States and is required for evaluational or information purpose under the conditions of (a) above, except that the release or disclosure may not include detailed [design,] manufacturing or process data.

"Required as an Element of Performance Under a Government Contract or Subcontract", as used in this subpart, means, in connection with the development of an item, component, or process, that the development was specified in a Government contract or subcontract[.] ~~or that the development was necessary for performance of a Government contract or subcontract.~~

"Restricted rights", as used in this subpart, means rights that apply only to computer software, and include, as a minimum, the right to-

(a) Use computer software with the computer for which or with which it was acquired, including use at any Government installation to which the computer may be transferred by the Government;

(b) Use computer software with a backup computer if the computer for which or with which it was acquired is inoperative;

(c) Copy [reasonable numbers of] computer programs for safekeeping (archives) or backup purposes; and

(d) Modify computer software, or combine it with other software, subject to the provision that those portions of the derivative software incorporating restricted rights software are subject to the same restricted rights.

~~In addition, restricted rights include any other specific rights not inconsistent with the minimum rights in (a)-(d).~~

~~above that are listed or described in a contract or in a license agreement made a part of a contract.~~

"Technical data", as used in this subpart, means recorded information, regardless of the form or method of recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

"Unlimited rights", as used in this subpart, means rights to use, duplicate, release, or disclose, technical data or computer software, in whole or in part, in any manner and for any [Government program, but not for commercial purposes] ~~purpose whatsoever~~, and to have or permit others to do so.

"Unpublished", as used in this subpart, means that technical data or computer software has not been released to the public nor furnished to others without restriction on further use or disclosure. Delivery of ~~other than unlimited rights~~ technical data or computer software to or for the Government under a contract does not, in itself, constitute release to the public.

227.472 Acquisition Policy for Technical Data and Rights in Technical Data.

227.472-1 General.

The acquisition of technical data and the rights to use that data requires a balancing of competing interests.

(a) The Government's Interests. The Government has extensive needs for many kinds of technical data and the rights to use such data. Its needs may exceed those of private commercial customers. Millions of separate items must be acquired, operated and maintained for defense purposes. Technical data are ~~required~~ [used] for training of personnel, overhaul and repair, cataloging, standardization, inspection and quality control, packaging and logistics operations. Technical data resulting from research and development and production contracts ~~must be~~ [are often] disseminated to many different users. The Government ~~must~~ make[s] technical data widely available to increase competition, lower costs and provide for mobilization. ~~Finally,~~ [T]he Government [also] has an interest in encouraging contractors to develop new technologies and to improve existing technologies to satisfy Government and commercial needs. To encourage contractors and subcontractors to expend resources in developing applications of these technologies, it ~~may be~~ [is] appropriate to allow them to exclusively exploit the technology. [The Government's ability to obtain technical data may be impaired unless restraint is exercised in attempting to obtain such data for competitive procurement.]

(b) The Contractor's Interests. ~~Commercial and non-profit organizations~~ [Contractors and subcontractors] have property rights and economic interests in technical data. Technical data are often closely held ~~in the commercial sector~~ because their disclosure to competitors could [will] jeopardize the contractor's [or subcontractor's] competitive advantage. Public disclosure can cause serious ~~economic~~ hardship to the originating company.

(c) The Balancing of [The Government's] Interests.

(1) The Government's need for technical data and a contractor's [or subcontractor's] ~~economic~~ interest[s] in it do not necessarily coincide. However, they may coincide. This is true in the case of innovative contractors [or subcontractor's] who can best be encouraged to develop items of military usefulness when their rights in such items are scrupulously protected.

(2) The Government needs to encourage delivery of data essential for military needs, even though that data would not customarily be disclosed in commercial practice. When the Government pays for research and development, it ~~has an obligation~~ [may need] to foster technological progress [in defense programs] through wide dissemination of the information and, where [fair and] practicable, to provide [for competition.] ~~competitive opportunities for other interested parties.~~ [However, the Government's ability to obtain

technical data may be impaired unless restraint is exercised in attempting to obtain such data for competitive procurement.]

(3) Acquiring, maintaining, storing, retrieving, protecting and distributing technical data are costly and burdensome for the Government. Therefore, it is necessary to avoid acquisition of unnecessary technical data.

227.472-2 Establishing Minimum Government Needs. The Department of Defense shall obtain only the minimum essential technical data and data rights. In establishing the minimum Government needs, the following factors shall be considered: [(1) whether the item, component or process can be competitively acquired by form, fit and function data, performance specifications, or by detailed design data; (ii) whether the repair or replacement parts will be commercial items (in which case rights in technical data should not be needed); (iii) whether the identical item, component, or process must be competitively acquired; and (iv) whether repair and overhaul work will be contracted out or performed in-house. In deciding when and how to acquire data and data rights, the Department of Defense shall use the least intrusive procedures in order to protect the contractor's and/or subcontractor's economic and property interests.] ~~whether the item, component, or process will be competitively acquired; whether repair and overhaul work will be~~

~~contracted out, whether the repair or replacement parts will be commercial items, or whether the item will [component or process can] be acquired by form, fit and function data, performance specifications, or by detailed design data. In deciding how to acquire data and data rights, the Department of Defense will use the least intrusive procedures in order to protect the contractor's economic interests (see Subpart 217.72).~~

227.472-3 Rights in Technical Data. There are three basic types of rights which apply to technical data delivered under contract to the Government. These are unlimited rights, limited rights, and Government purpose license rights. The Government [obtains] ~~is entitled to~~ unlimited rights in technical data as enumerated in (a)(1) below. The Government will obtain limited rights as discussed in (b)(1) below. Government purpose license rights may be established in accordance with (a)(2), (b)(2), or (c) below.

(a) Unlimited Rights.

(1) The Government ~~is entitled to and~~, except as provided in paragraph (a)(2), will receive unlimited rights in [technical data specified to be delivered under contract to the Government as follows:]

(i) Technical data pertaining to items, components, or processes which have been or will be developed exclusively with Government funds;

(ii) Technical data resulting directly from performance of experimental, developmental, or research work specified as an element of performance under a Government contract or subcontract [,except technical data pertaining to items, components, processes or computer software developed exclusively at private expense];

(iii) Form, fit, and function data pertaining to [separate] items, components, or processes prepared or required to be delivered under any Government contract or subcontract;

(iv) Manuals or instructional materials (other than detailed manufacturing or process data) prepared or required to be delivered under any Government contract or subcontract necessary for installation, operation, maintenance, or training purposes;

(v) Technical data prepared or required to be delivered under any Government contract or subcontract and constituting corrections or changes to Government-furnished data or computer software;

(vi) Technical data, which are otherwise publicly available, or have been released or disclosed by the contractor or subcontractor, without restriction on further release or disclosure;

(vii) Technical data in which the Government has obtained unlimited rights as a result of negotiations; [and]

(viii) Technical data previously delivered subject to [un] limited rights[.] ~~or Government purpose license rights which have expired, and~~

~~(ix) Technical data delivered under the contract which, at the time of delivery, are not identified in the listing described in paragraph (k) of the clause at 252.227-7013.~~

(2) Exception to Unlimited Rights - Government Purpose License Rights.

(i) To encourage commercial utilization of technologies developed under Government contracts, the

Government may agree to accept technical data subject to Government purpose license rights (GPLR). [that would otherwise be subject to unlimited rights.] The Government shall retain the royalty-free right to use, duplicate, and disclose data for Government purposes only and to permit others to do so for Government purposes only for a stated period of time; [or based on other objective criteria.] ~~After the time period has elapsed, the GPLR will expire and the Government will be entitled to [obtain] unlimited rights.~~

(ii) In cases where the Government would otherwise ~~be entitled~~ [obtain] ~~to~~ unlimited rights, the contracting officer should ~~not agree~~ [negotiate] to accept GPLR when --

(A) Technical data are [very] likely to be used for competitive procurement involving large numbers of potential competitors, [and purchased items], for items such as spares; and

(B) Technical data must be published (e.g., to disclose the results of research and development efforts).

(b) Limited Rights.

(1) Except as provided in paragraph (b)(2), the Government will obtain limited rights in

[(i) technical data, listed or described in an agreement incorporated into the Schedule of this contract, which the parties have agreed will be furnished with limited rights; and

(ii)] unpublished technical data [delivered as an element of performance under a Government contract or subcontract] pertaining to items, components, or processes developed exclusively at private expense; provided the data are properly marked with the limited rights legend[.] ~~and, provided they are not technical data described in paragraph (a) above.~~

(2) Exception to Limited Rights - Obtaining Greater Rights in Technical Data.

(i) If the Government needs data rights [(determined pursuant to 227.472-2) 217.72 and 227.473-1(b)(2)(i)] pertaining to items, components, or processes developed exclusively at private expense to develop alternative sources, the contracting officer may negotiate with the ~~contractor or subcontractor~~ [party asserting the rights] to acquire additional rights and technical assistance, ~~where appropriate.~~ [if such party cannot meet schedule and delivery requirements of the contract or subcontract, or, after cost/performance comparison between competing substitutes, it is determined that the [price] ~~value~~ of the item, component or process based on [comparable] ~~economic~~ order quantities is not fair and reasonable.] Before [seeking to negotiate] acquiring additional rights, the contracting officer should consider alternatives, such as-

(A) Developing [performance, functional or design

requirements for] alternate items, components, or processes;
or

(B) [Identifying commercial substitutes; or]

(C) Obtaining a commitment by the contractor or subcontractor to [direct license] ~~qualify additional sources.~~

[(C) Encourage the party asserting the rights to license another source.]

(ii) [If g]Greater rights in technical data [are to] ~~may~~ be obtained by negotiation [payment may be] of a lump sum fee, royalty, GPLR or other arrangement. Any greater rights shall [not be included in evaluation of the bid price] ~~be stated as a separate contract line item.~~ The contracting officer shall not [commence negotiations to] acquire any greater rights unless--

~~(A) There is a need for disclosure outside the Government, and~~

[(A)]~~(B)~~ If the specific rights are required for competitive procurement, the anticipated savings from competition are likely to exceed the [full] acquisition cost[s] to the Government] of the technical data and the rights therein.

(c) Rights in Technical Data Pertaining to Items, Components, and Processes Developed with Mixed Funding.

As required by 10 U.S.C. 2320, [(a)(2)(E),] the contracting officer will negotiate rights in technical data ~~associated with~~ [pertaining to] an item, component, or process [or subpart thereof] developed in part with

Government funds and in part with private expense (mixed funding) whenever a contractor provides the notice contained in 252.227-7035 or 252.227-7013[J] with respect to such data. Absent the notice, the Government shall have ~~unlimited rights in the technical data and~~ shall have met the obligation to negotiate. Negotiations shall begin at the earliest possible time and the results shall be incorporated into the contract, preferably at time of award, but in any event before delivery of the data.

227.473 General Procedures.

227.473-1 Procedures for Establishing rights in Technical Data.

(a) Notification Requirements.

(1) Background. The provision at 252.227-7035 and the clause at 252.227-7013[(J)] require offerors and contractors to notify [to the extent feasible] the Government of any asserted restrictions on the Government's right to use or disclose technical data or computer software. This notice advises the contracting officer of the contractor's or any subcontractor's intended use of items, components, processes, or computer software that--

- (i) Have been developed exclusively at private expense;
- (ii) Have been developed in part at private expense; or

(iii) Embody technology developed exclusively with Government funds for which the contractor or subcontractor requests the Government to grant exclusive commercial rights.

(2) Preaward Notification. If a solicitation will result in a contract requiring delivery of technical data, the provision at 252.227-7035, Preaward Notification of Rights in Technical Data and Computer Software, shall be included in the solicitation. This provision requires the offeror [to the extent feasible] to identify items, components, processes or computer software which it intends to use and which ~~would~~ [require such technical data to be delivered] ~~result in delivery of technical data to the~~ Government with other than unlimited rights. ~~The~~ [This] notification [is] ~~must be accompanied by the certification~~ described in (a)(4) below.

(3) Postaward Notification. The Government needs continuing information about the contractor's intent to use items, components, processes or computer software that would result in delivery to the Government of technical data with other than unlimited rights. The clause at 252.227-7013[(J)] requires the contractor to continue the notification process during performance of the contract[.] ~~by notifying the contracting officer prior to committing to the use of the privately developed item, component, process or computer software.~~ This notification [is] ~~must be accompanied by the contractor's certification as~~ described in (a)(4) below.

(4) ~~Certifications~~ [Notifications].

(i) If delivery of technical data is expected under a resultant negotiated contract, the provision at 252-227-7028, Requirement for Technical Data [Notification] ~~Certification~~, shall be included in the solicitation. The provision requires the contractor to provide the following:

(A) Identification of an existing contract or subcontract under which the technical data were delivered or will be delivered with other than unlimited rights, and the place of delivery; and

(B) Identification of the limitation on the Government's right to use the data, including identification of the earliest expiration date for the limitation. [, if any.]

(ii) If pursuant to the preaward or postaward notification procedures the offeror/contractor notifies the Government that technical data or computer software may be delivered with other than unlimited rights, then the notice must be accompanied by the [Notification] ~~Certification~~ at 252.227-7038, "Listing and [Notification] ~~Certification~~ of Technology Developed with Private Funding."

(iii) This [notification] ~~certification~~ authorizes the contracting officer to request additional information needed to evaluate the assertions.

(iv) This certification [notification] assists the ~~parties~~ [Government, ~~contractor and subcontractors~~] to

negotiate [directly with the party asserting the] rights in technical data and computer software to be delivered to the Government with other than unlimited rights, but does not alter the rights of the parties which are contained in the clause at 252.227-7037—[unless it is so stated in the contract. (See 252.227-7013). If the Contracting Officer makes a decision regarding rights in technical data adverse to the rights asserted by a contractor or subcontractor, such contractor or subcontractor shall have the right to appeal the decision].

(b) Establishing Rights in Technical Data.

(1) General. The contracting officer shall review and evaluate assertions contained in preaward or postaward notifications to determine the likely impact on the Government's ability to meet its needs. The contracting officer will then either--

(i) Agree with the assertions,—[within a reasonable time;]

(ii) Enter into negotiations [with the party asserting the right] to establish the respective rights of the parties,—or [if negotiations are required in accordance with 227.472-3 subsections (a)(2), (b)(2), (c) and 227.473-1(b)(2)(ii)]

(iii) Determine that negotiations are not practicable, in which case the rights will be established in accordance with (d) below.

(2) Negotiations.

(i) Negotiation Factors. [(Government funding involved)]. [The Contracting Officer's negotiation objective shall be any of the standard rights (See 227.472-3) or combinations thereof.] The contracting officer shall consider the following factors when negotiating rights [with the party asserting the rights] in technical data developed with mixed funding or when the Government negotiates to relinquish rights[:] ~~or to acquire greater rights.~~

(A) The acquisition strategy for the item ~~or system~~ (including logistics support);

(B) Whether the item ~~or system~~ (or related logistics support) will be competed;

(C) Timing of such competition;

(D) [The contractor's or subcontractor's intent to] ~~whether the technology can be commercialized;~~

(E) Funding contributions of the respective parties;

(F) [Mobilization needs] ~~Development of alternative sources for industrial mobilization or other purposes;~~

(G) Burden on the Government of protecting the contractor's [or subcontractor's] rights in technical data. [for the discrete development effort for which Federal funds were paid.]

[(H) Encourage development of items partially at private expense.]

[(ii) Negotiation Factors. (No Government funding involved). The contracting officer shall consider the following factors when negotiating rights with the party asserting the rights in technical data developed exclusively at private expense:

(A) Whether the party asserting the rights is able to satisfy established delivery or schedule requirements;

(B) Whether, after cost/performance comparison between competing substitutes, the value for the item at economic order quantities is fair and reasonable.

(C) Mobilization needs.

Such negotiation attempts shall not be undertaken under this paragraph unless it is determined, after a finding upon a documented record that -

(a) There is a need or requirement for disclosure of such technical data outside the Government for purposes such as reprocurement or evaluation of the item, component or process to which the technical data pertains; and

(b) If the specific rights obtained are for reprocurement, then the anticipated net savings in competitive reprocurements from additional sources will significantly exceed the acquisition cost of the technical data and the rights therein.]

~~(ii)~~ [(iii)] Negotiation Situations. The following are examples of how the negotiation factors in (b)(2)(i) [and (ii)] above may be applied:

(A) When the Government does not have an immediate need to use the data [developed with some Government ~~mixed~~ funding] for competition and the contractor has not requested exclusive commercial rights in the data, the Government will negotiate to establish limited rights which, upon expiration of a time limitation, shall become unlimited rights.

(B) Where the Government requires use of data for immediate competition, the contractor has requested exclusive commercial rights in ~~the~~ data [developed exclusively with Government funds] (i.e., [the contractor or subcontractor intends to commercialize] ~~the data has commercial application~~), and protecting the contractor's rights is not unduly burdensome on the Government, the contracting officer will negotiate GPLR which will expire after a specified period of time and become unlimited rights.

(C) Where the Government requires immediate use of ~~the~~ data [developed exclusively with Government funds] for competition and the contractor has no interest in commercializing the data, the Government may negotiate to obtain unlimited rights.

[(D) When the Government has an immediate need for an additional source of supply of an item, component or process developed exclusively at private expense, the contracting officer will negotiate to encourage the party asserting the rights to directly license another source.]

[(e) For study contracts not calling for development of items, components or processes, the Contracting Officer may predetermine that technical data developed at private expense may be submitted with limited rights. This is encouraged for contracts to further study and explore unique or valuable designs proposed by a contractor or subcontractor. Such predetermination should be subject to the definition of limited rights upon delivery under a development contract of essentially the same designs for items, components or processes developed under the contract.]

~~(iii)~~ [iv)] Negotiation of Time Periods. When time limitations ~~for either CPLR or limited rights~~ are negotiated, they shall be expressed in the contract as a date certain [or production of a certain number of units] and should normally be no less than one year nor more than five years after the [actual] ~~estimated~~ date of first production delivery to the Government of the item, component, process, or computer software [or subpart thereof developed in whole or in part with Government funds] to which the technical data pertains.

(A) The time limitations will be based on the following factors:

- (1) Relative funding contribution of the parties;
- (2) Anticipated date the technical data will be needed for competition;
- (3) The economic life of the technology;

(4) The contractor's or subcontractor's agreement to establish or assist in establishing additional sources of supply;

~~(5) The burden on the Government in restricting disclosure;~~

(6) The [contractor's or subcontractor's intent to commercialize] ~~potential commercial uses of the technology;~~

(B) Time limitations for ~~GPLR and limited rights~~ greater than five years may be negotiated to provide the contractor a reasonable opportunity to recover its private investment, ~~[.] if:~~

~~(1) The technical data will not be needed for competition; and~~

~~(2) Longer periods are approved by the chief of the contracting office.~~

(C) Time limitations for ~~limited rights and~~ GPLR may be extended, ~~[.] if:~~

~~(1) Other interested parties have not requested access to the technical data;~~

~~(2) The technical data need not be publicly disclosed to meet a specified Government need; and~~

~~(3) The contractor provides adequate consideration for remarking any technical data with revised legends.~~

~~(iv)~~ [(v)] Non-Standard License Rights. Unlimited rights, Government purpose license rights, and limited

rights and combinations of [the first two] ~~these~~ rights (i.e., with time limitations) are considered standard license rights. All other license rights [which may be limited to use, release and disclosure on a limited basis to meet a specified need e.g. inspection and acceptance]] are considered non-standard license rights [but may be] ~~and shall not be~~ negotiated [to meet specified Government needs.] ~~unless approved by the head of the contracting activity.~~

(c) Contract Documentation.

(1) Listing.

(i) The contracting officer shall incorporate into the contract [,or acknowledge as a part of a relevant subcontract,] a list of any items, components, processes, (and rights therein) to be delivered with other than unlimited rights.

(ii) During the life of the contract, ~~a bilateral~~ modification[s] of the contract [, or relevant subcontract, are] ~~may be~~ appropriate to incorporate the privately developed items, components, processes, or computer software identified by the contractor under the notification procedures. Also, during contract performance, changing conditions (e.g., schedule [configuration] or cost) [will probably] ~~may~~ require ~~bilateral~~ modification of the list.

(iii) By the time the technical data are delivered to the Government, the list ~~must~~ [should, to the extent possible]--

(A) Identify the items, components, processes, or computer software to which the technical data pertains;

(B) Identify or describe the technical data or computer software subject to other than unlimited rights; and

(C) Identify or describe, as appropriate, the category or categories of Government rights, the agreed-to time limitations, or any special restrictions on the use or disclosure of the technical data or computer software [. and]

[(D) Identify data, the status of which is still is dispute at the time of scheduled delivery, shall be delivered as limited rights data. Upon resolution its marking shall be appropriately modified, if necessary, at no additional charge to the Government.]

[(iv) Any lower tier subcontractor required to deliver technical data in which he claims other than unlimited " rights has a right of access to the contract list. If the data in which he claims other than unlimited is not on the contract list, or he is denied access to the contract list, such subcontractor is relived of his obligation to deliver such technical data until the data is on the contract list consistent with the subcontractor's claim or agreement.]

(2) Standard Non-Disclosure Agreements.

(i) Technical data subject to other than unlimited rights shall not be released outside the Government unless the release is subject to a prohibition against further release, use, or disclosure. If the data is subject to GPLR, [or any other use, release or disclosure restriction of technical data which the party asserting the rights has maintained] the recipient must sign the Standard Non-disclosure Agreement shown below. This Agreement must be executed by an official authorized to bind the [recipient] ~~contractor~~.

(ii) Nothing in this section impairs the rights of the [party asserting the rights] ~~developer of the data~~ and third parties from independently entering into agreements concerning commercial uses of the data.

(iii) The contracting officer shall require each ~~contractor~~ [recipient] ~~receiving data subject to GPLR~~ to execute the Standard Non-disclosure Agreement before receipt of the data. ~~If a contractor has previously signed an agreement, the earliest agreement may be provided.~~

Standard Non-disclosure Agreement

The undersigned, _____ (name) _____ as the authorized representative of _____ (company name) _____ (hereinafter, "the [recipient] ~~licensee~~"), requests [restrictive] technical data subject to Government Purpose

License Rights (~~hereinafter, "GPLR data"~~) [or any other restrictive, non-disclosure legend (hereinafter "restrictive data")] to compete for, perform, or to prepare to compete for, or to perform Government contracts. In consideration therefore:

(1) ~~Licensee~~ [Recipient] agrees that the ~~GPLR~~ [restrictive] data identified in this agreement shall be used only for [the below specified] Government purposes:

[]
[]
[]

(2) ~~Licensee~~ [Recipient] agrees to [promptly] provide written notice and a copy of ~~the~~ [this] non-disclosure agreement to the ~~contractor~~ [party] whose name appears in the ~~GPLR~~ [restrictive data] legend (hereinafter referred to as the "contractor") [and the Government office providing the restrictive data] whenever it receives ~~GPLR~~ [such] data. The notification shall identify the ~~GPLR~~ [restrictive] data, the date and place of its receipt and the source from which [it] ~~the data~~ was received.

(3) ~~Licensee~~ [Recipient] shall not, without [the] prior written permission of the contractor, provide or disclose any ~~GPLR~~ [restricted] data to any other company, person or entity, except its subcontractors. [, essential for performance of the work and then only after such] ~~The~~

~~Licensee agrees not to disclose GPLR data to any subcontractor or potential subcontractor unless the subcontractor or potential subcontractor has [first] executed [this] the Standard Non-disclosure Agreement. [appropriately amended for the names of the parties].~~

(4) ~~Licensee~~ [Recipient] agrees not to use ~~GPLR~~ [such] data for [any] commercial purposes.

(5) ~~Licensee~~ [Recipient] agrees to adopt operating procedures and physical security measures designed to protect ~~GPLR~~ [such] data from disclosure or release to unauthorized third parties.

(6) ~~Licensee~~ [Recipient] agrees to indemnify the Government, its agents and employees from all liability arising out of, or in any way related to, the misuse or unauthorized disclosure by the ~~licensee~~ [recipient], its employees or agents of any ~~GPLR~~ [such] data it received. ~~Licensee~~ [Recipient] will hold the Government, its agents and employees, harmless against any claim or liability, including attorney fees, costs and expenses, arising out of the misuse or unauthorized disclosure of any ~~GPLR~~ [such] data supplied to the ~~licensee~~ [recipient] hereunder.

[(7) Recipient shall not be liable for use or disclosure or any such Proprietary Information if it can establish by contemporaneous, clear, and convincing written evidence that the same:

(a) is or becomes a part of the public knowledge or literature without breach of this Agreement by the receiving party; or

(b) is known to the receiving party without restriction as to further disclosure when received; or

(c) is independently developed by the receiving party, and was not acquired directly or indirectly under any secrecy obligation from the originating party; or

(d) becomes known to the receiving party from a third party who had a lawful right to disclose it and without breach of this Agreement; or

(e) is disclosed by the originating party to a third party, including the United States Government, without restriction as to further disclosure.

Specific Proprietary Information shall not be deemed to be available to the public or in the possession of the receiving party merely because it is embraced by more general information so available or in the receiving party's possession.

(8) Notwithstanding the prohibition of nondisclosure set forth herein, each party may disclose the Proprietary Information of the other party to the United States Government during the term of this Agreement for the purposes set forth in Paragraph 1, but then only if marked with the appropriate restrictive legend in accordance with

FAR 52.215-12 or DoD FAR Supplement 252.227-7013, as applicable.]

~~(7) Execution of this non-disclosure agreement by the licensee [recipient] or any of its authorized subcontractors is for the benefit of the [Government and the] contractor identified in the legend or any GPLR [such] data received. Any such contractor is a third party beneficiary of this agreement who may have the right of direct action against the licensee [recipient] to enforce the [this] agreement or [and] to seek [such court orders as are necessary to prevent or remedy an actual or threatened] damages which may result from any material breach of the [this] agreement. [by recipient or other third parties. In that regard, the recipient hereby agrees that contractor's technical data disclosed to you is unique and valuable, and that the payment of monetary damages to contractor for misuse of its technical data will be inadequate to remedy the wrongful disclosure of such data. Recipient hereby consents to contractor obtaining an appropriate injunctive order from a court of competent jurisdiction to prevent the disclosure, and order the return to such contractor, of any such data wrongfully disclosed by recipient or other third party. Recipient hereby agrees to promptly pay for contractor's attorneys fees, costs and expenses for doing so.]~~

[(9)]~~(8)~~ This agreement shall be effective [until such] ~~only for so long as the data remains~~ [is] unpublished [in the public domain without a breach of this agreement] (or until [such restrictive] the ~~GPLR~~ legend expires).

Signed this ____ day of _____, 19____.

~~Licensee~~ [Recipient]

(d) Negotiation Impracticable.

(1) The contracting officer may determine that negotiations are impracticable when there are numerous offerors or when an award must be made under urgent circumstances. This determination must be approved by the [head] ~~chief~~ of the contracting office. In such cases the contracting officer will notify the contractor [and any affected subcontractor or lower-tier supplier.] The contracting officer's notification shall provide that if, after receiving the notice, the contractor [or subcontractor] elects to use the item, component, or process that is asserted to be developed in part at private expense, it shall provide written notice to the contracting officer. In that event, the contracting officer [may submit to the contractor, or affected subcontractor, suggested] ~~shall insert a provision in the contract~~

~~providing~~ procedures for subsequent negotiation of the respective rights of the parties.

(2) Data rights need not be negotiated for small purchases and contracts awarded using sealed bidding.

[(3) Negotiations on data rights shall be concluded at such time that the contractor or subcontractor so declares.]

[(4) Any lower tier subcontractor required to deliver technical data in which he claims other than unlimited rights has a right of access to the contract list. If the data in which he claims other than unlimited is not on the contract list, or he is denied access to the contract list, such subcontractor is relieved of his obligation to deliver such technical data until the data is on the contract list consistent with the subcontractor's claim or agreement.]

(e) Contract Clause. The contracting officer shall insert the basic data clause at 252.227-7013, [(entitled "Rights in Technical Data and Computer Software")], in solicitations and contracts when technical data is specified to be delivered or computer software may be originated, developed, or delivered, provided that [flowdown is authorized by law] such clause shall not be used in solicitations and contracts--

(1) When existing works are to be acquired in accordance with 227.277;

(2) When special works are to be acquired in accordance with 227.476;

(3) When the work will be performed by foreign sources in accordance with 227.475-5; and

(4) For architect-engineer services or construction in accordance with 227.478.

227.473-2 Prohibitions.

(a) In accordance with 10 U.S.C. 2320(a)(1), a contractor or subcontractor may not be prohibited from receiving from a third party a fee or royalty for the use of technical data pertaining to an item, component, or process developed exclusively at private expense by the contractor or subcontractor, except as otherwise specifically provided by law.

[A contractor's or subcontractor's rights or the Government's rights with respect to patents or copy rights or any other right in technical data otherwise established by law may not be impaired.]

-(b)(1) In accordance with 10 U.S.C. 2320(a)(2)(F), a contractor or subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract or subcontract--

(i) To sell or otherwise relinquish to the United States any rights in technical data beyond those [limited rights] to which the Government is entitled under 10 U.S.C. 2320(a)(2)(C) and (D); or

(ii) To refrain from offering to use, or from using, an item, component, or process [developed by a contractor or subcontractor exclusively at private expense] to which the contractor [or subcontractor] is entitled to restrict the Government's rights in technical data under 10 U.S.C. 2320(a)(2)(B).

(2) ~~It is permissible to evaluate such factors as the impact life cycle costs of limitations on the Government's ability to use or disclose the technical data. Further,~~ [N]othing prohibits agreements which provide the Government with greater rights than it would otherwise be entitled to, for a fair and reasonable price (see 227.472-3(b)(2)).

(c) Prime contractors and higher-tier subcontractors are prohibited from using their power to award subcontracts as economic leverage to acquire rights in technical data from their subcontractors—[by violation of the prohibitions in subparagraphs (a) and (b) above, or otherwise.] A subcontractor, who would have the right pursuant to 227.472-3(b) [10 U.S.C. 2320(a)(2)(B) and (F)] to furnish technical data with limited rights, may furnish data directly to the Government rather than through the prime contractor.

227.473-3 Marking and Identification Requirements.

(a) Clauses. The contracting officer shall include the clauses at 252.227-7018 and 252.227-7029 in all contracts which also contain the clause at 252.227-7013. These clauses contain marking requirements for technical data and computer software and related procedures.

(b) Contractor Marking Procedures. The contractor's procedures required under the clause at 252.227-7018 shall be reviewed by the contract administration office[,] and the contracting officer may withhold payments under the clause at 252.227-7030 for failure to establish, maintain and follow adequate marking procedures.

(c) Unmarked Technical Data. Technical data received with no restrictive markings are deemed to be furnished with unlimited rights. However, within six months after delivery of such data, the contractor [or subcontractor] may request permission to place restrictive markings on the data at its own expense. The contracting officer may approve the request if the contractor--

- (1) Demonstrates that the omission was inadvertent;
- (2) Establishes that the use of the markings is authorized; and
- (3) Relieves the Government of liability with respect to the technical data.

(d) Unjustified markings. If the contracting officer believes that restrictive markings are not justified, the contracting officer will follow the procedures in 227.473-4 and the clause at 252.227-7037.

(e) Non-Conforming Markings. If technical data which the contractor is authorized by the contract to furnish with restrictive markings is received with non-conforming markings, the technical data shall be used according to the ~~proper~~ restriction, and the contractor shall be required to correct the markings to conform with the contract. Copyright notices, which conform to the requirement in 17 U.S.C. 401 and 402 are not considered restrictive markings. If the contractor fails to correct the markings within 60 days after notice, Government personnel may correct the [improper] markings at the contractor's expense, notify the contractor in writing, and thereafter may use the technical data accordingly.

227.473-4 Validation of Restrictive Markings on Technical Data.

(a) General. The clause at 252.227-7037 sets forth rights and procedures pertaining to the validation of restrictive markings asserted by contractors and subcontractors on deliverable technical data and shall be included in all solicitations and contracts which require the delivery of technical data. The Government should review the

validity of any asserted restriction on technical data deliverable under a contract. This review should be accomplished before acceptance of the technical data, but no later than three years after final payment or three years after delivery of the technical data to ~~the Government~~, [their next higher-tier contractor] whichever is later. The contracting officer may challenge restrictive markings if there are reasonable grounds to question their validity but only if the three-year period has not expired. However, the Government may challenge a restrictive marking at any time if the technical data (1) is publicly [ally] available; (2) has been furnished to the United States without restriction; or (3) has been otherwise made available without restriction. ~~Only the contracting officer's final decision resolving a formal challenge constitutes "validation" as addressed in 10 U.S.C. 2321. A decision by the Government not to challenge a restrictive marking or asserted restriction does not constitute "validation".~~

(b) Prechallenge Request for Information.

(1) Prior to making a written determination to challenge, the contracting officer ~~must~~ [may] request the contractor or subcontractor to furnish information explaining the basis for any asserted restriction. If this information is incomplete, [specific] additional justification ~~should~~ [may] be requested, [, or appropriate Government personnel

may inspect appropriate records at the contractor's or subcontractor's location of the records.] The contracting officer ~~should~~ [must] provide a reasonable time for submission of the required data.

(2) The contracting officer should request advice from the cognizant Government activity having interest in the validity of the markings.

(3) If the contracting officer, after reviewing all available information, determines that reasonable grounds [(defined in Clause 252.227-7037)] exist to question the current validity of a restrictive marking, and that continued adherence to the marking would make subsequent competition impracticable ~~or if the contractor or subcontractor fails to respond to the prechallenge request within a reasonable period~~, the contracting officer [may consider challenging] ~~shall challenge~~ the restriction following the procedures in the clause at 252.227-7037. [Reasonable grounds, for the purpose of a challenge means more than a mere suspicion exists (something akin to probable cause) to question the current validity and impracticality of competition.]

227.473-5 Remedies for Noncomplying Technical Data.

(a) When data does not comply with the contract, the contracting officer should consider all [available] remedies. These remedies include reduction of progress

payments, withholding final payment, contract termination, and a reduction in contract price or fee.

(b) The clause at 252.227-7030, Technical Data-- Withholding of Payment, is designed to assure timely delivery of technical data and shall be included in solicitations and contracts requiring delivery of technical data. Unless the [contracting officers deems] ~~contract specifies~~ a lesser withholding [amount is appropriate] ~~limit~~, the clause permits withholding up to 10 percent of the ~~contract~~ price. [of the deficient data.] The contracting officer shall determine the amount to be withheld after considering the estimated value of the technical data to the Government. Payment shall not be withheld when non-delivery results from causes beyond the control and without the fault or negligence of the contractor. ~~or subcontractor.~~

(c) If delivery of technical data is required, the clause at 252.227-7036, Certification of Technical Data Conformity, shall be included in solicitations and any resultant contract.

227.473-6 Reserved.

227.474 Reserved.

227.475 Other Procedures.

227.475-1 Data Requirements.

(a) The clause at 252.227-7031, Data Requirements, shall be included in all solicitations and contracts, except that the clause need not be included in--

(1) any contract or order less than \$25,000;

(2) any contract awarded to a contractor outside the United States, except those awarded under Subpart 225.71, Canadian Purchases;

(3) any research or exploratory development contract when reports are the only deliverable item(s);

(4) any service contract, when the contracting officer determines that the use of the DD Form 1423 is impractical;

(5) any contract under which construction and architectural drawings and specifications are the only deliverable items;

(6) any contract for commercial items when the only deliverable data is such an item, or would be packaged or furnished with such items in accordance with customary trade practices; or

(7) any contract for items containing potentially dangerous material requiring controls to assure adequate safety, when the only deliverable data is the Materials Safety Data Sheet (MSDS) required by the clause at FAR 52.223-3.

(b) The clause at 252.227-7031, Data Requirements, states that the contractor is required to deliver only data listed on the DD Form 1423 ~~and data deliverable under clauses prescribed in the FAR and DFARS.~~

227.475-2 Deferred Delivery and Deferred Ordering.

(a) General. Technical data and computer software is expensive to prepare, maintain and update. By delaying the delivery of technical data or software until needed, storage requirements are reduced and the probability of using obsolete technical data and computer software is decreased. Purchase of technical data and computer software which may become obsolete because of hardware changes is also minimized.

(b) Deferred Delivery. When the contract requires delivery of technical data or computer software, but does not contain a time for delivery, the clause at 252.227-7026 "Deferred Delivery of Technical Data and Computer Software", shall be included in the contract. The clause permits the contracting officer to require the delivery of data identified [on the DD 1423] as "deferred delivery" data at any time until two years after acceptance by the Government of all items (other than data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors to deliver such technical data

expires two years after the date the prime contractor accepts the last item from the subcontractor for use in the performance of the contract. The contract must specify which technical data or computer software will be subject to deferred delivery. The contracting officer should provide sufficient notice to permit timely delivery of the technical data or computer software.

(c) Deferred Ordering. When a potential need exists for technical data or computer software [and has been documented under 227.473-1(b)(2),], but a firm requirement is not established, the clause at 252.227-7027, "Deferred Ordering of Technical Data or Computer Software", should be included in the contract. Under this clause, the contracting officer may order any technical data or computer software that [was required and paid for as a separate line item as an element] of performance under the Government contract [or subcontract.] If the clause at 252.227-7027 is exercised, then negotiations for rights in technical data will commence in accordance with 227.473-1 for preaward if the technical data is not on the listing incorporated in the contract.] ~~has been generated as part of the performance of the contract.~~ The contracting officer may order technical data or computer software under this clause at anytime until three years after acceptance of all items (other than technical data or computer software) under the contract or

contract termination, whichever is later. The obligation of subcontractors to deliver such technical data or computer software expires three years after the date the contractor accepts the last item under the subcontract. When the data and computer software is ordered, the delivery dates shall be negotiated and the contractor compensated for converting the technical data or computer software into the prescribed form. Compensation to the contractor shall not include the cost of technical data or computer software which the Government has already paid for.

227.475-3 Warranties of Technical Data.

The factors contained in Subpart 246.7, Warranties, shall be considered in deciding whether to include warranties of technical data. The basic technical data warranty clause is set forth in the clause at 252.246-7001. There are two alternates to the basic clause. The basic clause and appropriate alternate should be selected in accordance with Section 246.708.

227.475-4 Delivery of Technical Data to Foreign Government.

When the Government proposes to make technical data [(other than detailed manufacturing or process data)] subject to limited rights available for use by a foreign Government, it will, ~~to the maximum extent practicable~~, give reasonable notice to the contractor or subcontractor asserting rights

in the technical data. Any release shall be subject to a prohibition against further release, use or disclosure.

227.475-5 Overseas Contracts With Foreign Source.

The clause at 252.227-7032, Rights in Technical Data and Computer Software (Foreign), should be used in solicitations and contracts with foreign sources when the Government will acquire unlimited rights in all deliverable technical data, and computer software. However, the clause shall not be used in contracts for special works (see section 227-476), contracts for existing works (see section 227-477), or contracts for Canadian purchases (see Subpart 225.71, Canadian Purchases). However, the clause at 252.227-7013, "Rights in Technical Data and Computer Software", shall be used whenever the rights to be obtained are those which would be obtained if contracting with United States firms. Either clause may be modified to meet the peculiar requirements of the foreign acquisition; Provided, it is consistent with sections 227.472 and 227.481.

227.475-6 Reserved.

227.475-7 Reserved.

227.475-8 Publication for Sale.

Alternate I of the clause at 252.227-7013, Rights in Technical Data and Computer Software, may be used in research contracts when the contracting officer determines, in consultation with counsel, that public dissemination by the contractor:

- (a) Would be in the interest of the Government;
- (b) Would be facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

227.476 Special Works.

(a) The clause at 252.227-7020, Rights in Data--Special Works, shall be used in all contracts where the Government needs ownership and control of the work to be generated under the contract. Examples include:

- (1) Production of audiovisual works including motion pictures;
- (2) Television records with or without accompanying sound;
- (3) Preparation of motion picture scripts, musical compositions, sound tracks, translations, adaptations, and the like;
- (4) Histories of the respective Departments for services or units thereof;

(5) Works pertaining to recruiting, morale, training, or career guidance;

(6) Works pertaining to the instruction or guidance of Government officers and employees in the discharge of their official duties; and

~~(7) Production of technical reports and studies.~~

(b) Contracts for audiovisual works may include limitations in connection with music licenses, talent releases, and the like which are consistent with the purpose for which the works are acquired.

227.477 Contracts for Acquisition of Existing Works.

(a) Acquisition of Existing Works.

(1) The clause at 252.227-7021, Rights in Data-- Existing Works, shall be used in contracts exclusively for the acquisition of existing motion pictures, television recordings, or other audiovisual works. The contract may contain limitations consistent with the purposes for which the material covered by the contract is being acquired. Examples of these limitations are--(i) means of exhibition or transmission; (ii) time; (iii) type of audience; and (iv) geographical location. The indemnity language in paragraph (c) of the clause may be modified to be consistent.

(2) In contracts which call for the modification of existing motion pictures, television records, or other

audiovisual works through editing, translation, or addition of subject matter, the clause at 252.227-7020, Rights in Data--Special works, appropriately modified, shall be used.

(b) Off-the Shelf Acquisition of Books and Similar Items.

Unless the right to reproduce technical data is an objective of the contract, no contract clause prescribed in this part need be included in contracts solely to acquire data, other than motion pictures, which exist before the start of the acquisition (such as the off-the-shelf acquisitions of existing products).

227-478 Architect-Engineer and Construction Contracts.

227.478-1 General.

This section sets forth policies and procedures, pertaining to data, copyrights, and restricted designs unique to the acquisition of construction and architect-engineer services.

227.478-2 Acquisition and Use of Plans, Specifications, and Drawings.

(a) Architectural Designs and Data Clauses for Architect-Engineer or Construction Contracts.

(1) Plans and Specifications as As-Built Drawings.

(i) Except as provided in (a)(1)(ii) below, use the clause at 252.227-7022, Government Rights (Unlimited), in solicitations and contracts for architect-engineer services and for construction involving architect-engineer services.

(ii) When the purpose of a contract for architect-engineer services or for construction involving architect-engineer services is to obtain a unique architectural design of a building, a monument, or construction of similar nature, which for artistic, aesthetic or other special reasons the Government does not want duplicated, the Government may acquire exclusive control of the data pertaining to design by including the clause at 252.227-7023, Drawings and Other Data to Become Property of Government, in solicitations and contracts.

(2) Shop Drawings for Construction. The Government shall obtain unlimited rights in shop drawings for construction. In solicitations and contracts calling for delivery of shop drawings, include the clause at 252.227-7033, Rights in Shop Drawings.

227.478-3 Contracts for Construction Supplies and Research and Development Work.

The provisions and clauses required by this section shall not be used when the acquisition is limited to either (a) construction supplies or materials, (b) experimental,

developmental, or research work, or test and evaluation studies of structures, equipment, processes, or materials for use in construction; or (c) both.

227.478-4 Reserved.

227.478-5 Approval of Restricted Designs.

The clause at 252.227-7024, Notice and Approval of Restricted Designs, may be included in architect-engineer contracts to permit the Government to make informed decisions concerning noncompetitive aspects of the design.

227.479 Small Business Innovative Research Program (SBIR Program).

(a) Public Law 97-219, "Small Business Innovation Development Act of 1982", requires the Department of Defense to establish a Small Business Innovation Research program (SBIR Program). Small Business Administration (SBA) Policy directive No. 65-01 provides guidance on the program.

(b)(1) Data and computer software generated under an SBIR program contract shall not be disclosed outside the Government for two years after contract completion, except--

- (i) When necessary for program evaluation, or
- (ii) When the contractor consents in writing to additional disclosure.

(2) Upon expiration of the period of non-disclosure, the Government shall have a nonexclusive, worldwide, royalty-free license in technical data and computer software for Government use.

(c) Copyrights in technical data and computer software generated under an SBIR program contract shall, when agreed to in writing by the contracting officer, be owned by the contractor. The Government should obtain a royalty-free license under any copyright. Each publication of copyrighted material should contain an appropriate acknowledgment and disclaimer statement.

(d) The clause at 252.227-7013, Rights in Technical Data and Computer Software, with its Alternate II, shall be included in all contracts awarded under the SBIR program which require delivery of technical data or computer software.

227.480 Copyrights.

(a) In general, the copyright law gives an owner of copyright the exclusive rights to--

- (1) Reproduce the copyrighted work;
- (2) Prepare derivative works;
- (3) Distribute copies or phonorecords to the public;
- (4) Perform the copyrighted work publicly; and
- (5) Display the copyrighted work publicly.

(b) Any material that is protected under the copyright law is not in the public domain, even though it may have been published. Acts inconsistent with the rights in (a) above may not be exercised without a license from the copyright owner.

~~(c) Department of Defense policy allows the contractor to copyright any work of authorship first prepared, produced, originated, developed, or generated under a contract, unless the work is designated a "special work". If the work is a special work, the Government retains ownership and control of the work. The contractor may not assert any rights or claim to copyright in special works. The contractor is required to grant to the Government and authorize the Government to grant to others a nonexclusive, paid-up, worldwide license for Government purposes in any work of authorship (other than a "special work") first prepared, produced, originated, developed, or generated under the contract.~~

~~(d) The clause at 252.227-7013{(e)}, Rights in Technical Data and Computer Software, requires the contractor to grant the Government and authorizes the Government to grant to others a nonexclusive, paid-up, worldwide license for Government purposes, under any copyright owned by the contractor in any technical data or computer software prepared for or acquired by the Government under the~~

~~contract. The clause at 252.227-7020, Rights in Data Special Works, requires that any work first produced in the performance of the contract become the sole property of the Government, and the contractor agrees not to assert any rights or establish any claim to copyright in such work. this clause requires that the contractor grant to the Government and authorize the Government to grant to others a nonexclusive, paid-up, worldwide license for Government purposes in any portion of a work which is not first produced in the performance of the contract but in which copyright is owned by the contractor and which is incorporated in the work furnished under the contract.~~

~~(e) The clauses at 252.227-7013 and 252.227-7020 provide that, unless written approval of the contracting officer is obtained, the contractor agrees not to include in any work prepared, produced, originated, developed, generated or acquired under the contract, any work of authorship in which copyright is not owned by the contractor without acquiring for the Government and those acting by or on behalf of the Government a nonexclusive, paid-up, worldwide license for Government purposes in the copyrighted work.~~

227.481 Acquisition of Rights in Computer Software.

* * * * *

227.482 Reserved.

PART 252--SOLICITATION PROVISIONS AND CONTRACT CLAUSES.

[252.227-7013 Rights in Technical Data and Computer Software.
 252.227-7014 Reserved.
 252.227-7015 Reserved.
 252.227-7016 Reserved.
 252.227-7017 Reserved.
 252.227-7018 Restrictive Markings on Technical Data (APR. 1988).
 252.227-7019 Identification of Restricted Rights Computer Software.
 252.227-7020 Rights in Data--Special Works.
 252.227-7021 Rights in Data--Existing Works.
 252.227-7022 Government Rights (Unlimited).
 252.227-7023 Drawings and Other Data to Become Property of the Government.
 252.227-7024 Notice and Approval of Restricted Designs.
 252.227-7025 Reserved.
 252.227-7026 Deferred Delivery of Technical Data or Computer Software.
 252.227-7027 Deferred Ordering of Technical Data or Computer Software.
 252.227-7028 Requirement for Technical Data Certification.
 252.227-7029 Identification of Technical Data.
 252.227-7030 Technical Data--Withholding of Payment.
 252.227-7031 Data Requirements.
 252.227-7032 Rights in Technical Data and Computer Software (Foreign).
 252.227-7033 Rights in Shop Drawings.
 252.227-7034 Patents--Subcontracts.
 252.227-7035 Preaward Notification of Rights in Technical Data and Computer Software.
 252.227-7036 Certification of Technical Data Conformity.
 252.227-7037 Validation of Restrictive Markings on Technical Data.
 252.227-7038 Listing and Certification of Development of Technology (APR 1988).]

3. Sections 252.227-7013, 252.227-7018 through 252.227-7024, 252.227-7026 through 252.227-7033 and 252.227-7035 through 252.227-7037 are revised; sections 252.227-7016, 252.227-7017, and 252.227-7025 are removed and reserved; and section 252.227-7038 is added to read as follows:

252.227-7013 Rights in Technical Data and Computer Software.

As prescribed at ~~227.472-3(e)~~ [227.473-1(e)] and 227.479(d), insert the following clause:

RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE (APR 1988)**(a) Definitions.**

(1) "Commercial computer software", as used in this clause, means computer software which is used ~~regularly~~ for other than Government purposes and is sold, licensed, or leased ~~in significant quantities~~ to the general public[.] ~~at established market or catalog prices.~~

(2) "Computer", as used in this clause, means a data processing device capable of accepting data, performing prescribed operations on the data, and supplying the results of these operations; for example, a device that operates on discrete data by performing arithmetic and logic processes on the data, or a device that operates on analog data by performing physical processes on the data.

(3) "Computer data base", as used in this clause, means a collection of data in a form capable of being processed and operated on by a computer.

(4) "Computer program", as used in this clause, means a series of instructions or statements in a form acceptable to a computer, designed to cause the computer to execute an operation or operations. Computer programs include

operating systems, assemblers, compilers, interpreters, data management systems, utility programs, sort-merge programs, and ADPE maintenance/diagnostic programs, as well as applications programs such as payroll, inventory control, and engineering analysis programs. Computer programs may be either machine-dependent or machine-independent, and may be general-purpose in nature or be designed to satisfy the requirements of a particular user.

(5) "Computer software", as used in this clause, means computer programs and computer data bases.

(6) "Computer software documentation", as used in this clause, means technical data, including computer listings and printouts, in human-readable form which (i) documents the design or details of computer software, (ii) explains the capabilities of the software, or (iii) provides operating instructions for using the software to obtain desired results from a computer.

(7) "Data", as used in this clause, means recorded information, regardless of form or method of the recording.

(8) "Detailed design data", as used in this clause, means technical data that describes the physical configuration and performance characteristics of an item or component in sufficient detail to [enable] ensure that an item or component produced in accordance with the technical data will [to] be essentially identical to the original item or component.

(9) "Detailed manufacturing or process data", as used in this clause, means technical data that describes the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

(10) "Developed", as used in this clause, means that the item, component, or process exists and is workable. Thus, the item or component must have been constructed [in nearly every case] or the process practiced. Workability is generally established when the item, component or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended [and considered a part of its development.]. Whether, ~~how much,~~ ~~and what type of~~ analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered "developed", the item, component, or process need not be at the stage where it could be offered for sale or ~~sold on the commercial market,~~ nor must the item, component or process be actually reduced to practice within the meaning of Title 35 of the United States Code.

(11) "Developed Exclusively with Government Funds", as used in this clause, means, in connection with an item,

component, or process, that the [direct] cost of development was ~~directly~~ paid for in whole by the Government [and] ~~or that the development was required~~ [specified] as an element of performance under a Government contract or subcontract.

(12) "Developed Exclusively at Private Expense", as used in this clause, means in connection with an item, component, or process, that no part of the [direct] cost of development was paid for by the Government[.] ~~and that the development was not required as an element of performance under a Government contract or subcontract.~~ Independent research and development and bid and proposal costs, as defined in FAR 31.205-18 (whether or not included in a formal independent research and development program), are considered to be at private expense. ~~Indirect costs are of development are considered Government funded when development was required as an element of performance in a Government contract or subcontract. Indirect costs are considered funded at private expense when development was not required as an element of performance under a Government contract or subcontract.~~ [When, in applying these criteria, the entire item, component or process doesn't qualify as "Developed Exclusively at Private Expense", then separate elements thereof which do meet the criteria shall be deemed to qualify; such a separate element can be an existing conceptual design which is focal to the workability of the item, component or process.]

(13) "Form, fit, and function data", as used in this clause, means technical data that describes the required overall physical, functional, and performance characteristics, (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(14) "Government purpose license rights" (GPLR), as used in this clause, means [the Government may] ~~rights to~~ use, duplicate, or disclose data [to a licensee according to the terms of its license] (and in the SBIR program, computer software), in whole or in part and in any manner, for Government purposes only, and to have or permit others [the licensee] to [utilize such data] ~~do so~~ for Government purposes only. Government purposes include competitive procurement, but do not include the right to have or permit [licensees] ~~others~~ to use technical data (and in the SBIR Program, computer software) for the commercial purposes.

(15) "Limited rights", as used in this clause, means rights to use, duplicate, or disclose technical data, in whole or in part, by or for the Government, with the express limitation that such technical data shall not, without the written permission of the party asserting limited rights, be: [(i)] released or disclosed outside the Government; [(ii)] used by the Government for manufacture, or in the case of computer software documentation, for preparing the

same or similar computer software; [(iii)] or used by a party other than the Government, except when:

(i) Release, disclosure, or use is necessary for emergency repair or overhaul; [where the item, component or process concerned is not otherwise reasonably available to enable timely performance of work] provided that the release, disclosure, or use outside the Government shall be made subject to a [written] prohibition against further use, release, or disclosure, and that the party asserting limited rights be [promptly] notified [in writing] by the contracting officer of such release, disclosure, or use [and receive a copy of the nondisclosure agreement]; or

(ii) Release or disclosure to a foreign Government that is in the interest of the United States and is required for evaluational or informational purpose under the conditions of (a) above, except that the release or disclosure may not include detailed [design,] manufacturing or process data.

(16) "Required as an Element of Performance Under a Government Contract or Subcontract", as used in this clause, means, in connection with the development of an item, component, or process, that the development was specified in a Government contract or subcontract[.] ~~or that the development was necessary for performance of a Government contract or subcontract.~~

(17) "Restricted rights", as used in this clause, means rights that apply only to computer software, and include, as a minimum, the right to--

(i) Use computer software with the computer for which or with which it was acquired, including use at any Government installation to which the computer may be transferred by the Government;

(ii) Use computer software with a backup computer if the computer for which or with which it was acquired is inoperative;

(iii) Copy [reasonable numbers of] computer programs for safekeeping (archives) or backup purposes; and

(iv) Modify computer software, or combine it with other software, subject to the provision that those portions of the derivative software incorporating restricted rights software are subject to the same restricted rights.

~~In addition, restricted rights include any other specific rights not inconsistent with the minimum rights in (a)(17)(i)-(iv) above that are listed or described in the contract or described in a license agreement made a part of the contract.~~

(18) "Technical data", as used in this clause, means recorded information, regardless of the form or method of the recording of a scientific or technical nature (including computer software documentation). The term does not include

computer software or data incidental to contract administration, such as financial and/or management information.

(19) "Unlimited rights", as used in this clause, means rights to use, duplicate, release, or disclose, technical data or computer software in whole or in part, in any manner and for any [Government program, but not for commercial purposes] ~~purpose whatsoever~~, and to have or permit others to do so.

(20) "Unpublished", as used in this clause, means that technical data or computer software has not been released to the public or furnished to others without restriction on further use or disclosure. Delivery of ~~other than unlimited~~ rights technical data or computer software to or for the Government under the contract does not, in itself, constitute release to the public.

(b) Rights in Technical Data.

(1) Unlimited Rights.

The Government ~~is entitled to and~~, except as provided in paragraph (a)(2), will receive unlimited rights in [technical data specified delivered under contract to the Government, as follows:]

(i) Technical data pertaining to items, components, or processes which has been or will be developed exclusively with Government funds;

(ii) Technical data resulting directly from performance of experimental, developmental, or research work specified as an element of performance under a Government contract or subcontract [, except technical data pertaining to items, components, process or computer software developed exclusively at private expense;] ;

(iii) Form, fit, and function data pertaining to [separate] items, components, or processes prepared or required to be delivered under any Government contract or subcontract;

(iv) Manuals or instructional materials (other than detailed manufacturing or process data) prepared or required to be delivered under any Government contract or subcontract necessary for installation, operation, maintenance, or training purposes;

(v) Technical data prepared or required to be delivered under any Government contract or subcontract and constituting corrections or changes to Government-furnished data or computer software;

(vi) Technical data which are otherwise publicly available, or have been released or disclosed by the contractor or subcontractor, without restriction on further release or disclosure;

(vii) Technical data in which the Government has obtained unlimited rights as a result of negotiations; [and]

(viii) Technical data previously delivered subject to [un]limited rights[.] ~~or Government purpose license rights which has expired, and~~

~~(ix) Technical data delivered under the contract which, at the time of delivery, are not identified in the listing described in paragraph (k) of the clause at 252.227-7013.~~

(2) Government Purpose License Rights. The Government shall have Government purpose license rights (GPLR) in technical data which the parties have agreed will be furnished with GPLR. The Government may disclose or provide GPLR data to a person or corporation that has executed the Standard Non-Disclosure Agreement. [for the purposes specified therein.] This agreement establishes the third party beneficiary status of the contractor [or subcontractor] identified in the GPLR legend. If the recipient of GPLR data has [lawfully] executed the Standard Non-Disclosure Agreement, the contractor [or subcontractor] shall have no claim or right of action against the Government for damages related to misuse or unauthorized disclosure of the data. [by the recipient.] GPLR shall be effective, during the time period specified in the contract, only when the portion or portions of each piece of data subject to such rights are identified (for example, by circling, under-scoring, or a note), and are marked with the legend below containing:

(i) The number of the prime contract [and subcontract, if applicable] under which the technical data is to be delivered;

(ii) The name of the contractor and/or any subcontractor asserting [GPLR] ~~Government purpose license rights~~, and

(iii) The date [or production lot/unit number] when the data will be subject to unlimited rights.

GOVERNMENT PURPOSE LICENSE RIGHTS LEGEND

Contract No. _____

[Subcontract No. _____]

Contractor: _____

[Subcontractor: _____]

Government purpose license rights shall be effective until (insert date certain) [or production of a certain number of units] ; [unless extended]; thereafter, the Government purpose license rights will expire and the Government shall have unlimited rights in the technical data.

[End of Legend]

The restrictions governing use of technical data marked with this legend are set forth in the definition of "Government Purpose License Rights" in paragraph (a)(14)

above. This legend, together with the indications of the portions of this data which are subject to [GPLR] ~~Government purpose-license rights~~, shall be included on any reproduction hereof which includes any part of the portions subject to such limitations.

(3) Limited Rights. Unless otherwise agreed, the Government shall have limited rights in:

[(i)] ~~(i)~~ Technical data listed or described in an agreement, incorporated into the schedule of this contract which the parties have agreed will be furnished with limited rights;

[(ii)] ~~(i)~~ [Delivered t] Technical data pertaining to items, components, processes or computer software developed exclusively at private expense, ~~except for data in the categories in~~ (a)(1) above;

[(iii)] ~~(ii)~~ Technical data that the parties have agreed will be subject to limited rights for a specified period of time; and

[iv)] ~~(iii)~~ Technical data listed or described in a license agreement made a part of the contract and subject to conditions other than those described in the definitions of limited rights. ~~Notwithstanding any contrary provision in the license agreement, the Government shall have the rights included in the definition of "limited rights" in paragraph (a)(15) above.~~

Limited rights will remain in effect so long as the technical data remains unpublished and provided that only the portions of each piece of data subject to limited rights are identified (for example, by circling, underscoring, or a note), and the piece of data is marked with the legend below containing:

(A) The number of the prime contract [and the subcontract, (if applicable)] under which the technical data is to be delivered; and

(B) The name of the contractor and/or any subcontractor asserting limited rights.

(C) The date [or production lot/unit number] the data will be subject to unlimited rights (if applicable).

["] LIMITED RIGHTS LEGEND

Contract No. _____

[Subcontract No. _____

Contractor: _____

[Party asserting the Rights.] _____

(For technical data which the parties have agreed will be subject to limited rights for a specified time period, insert the agreed upon date. [or production lot/unit number

below.] ~~If the limited rights are not subject to an expiration date, so indicate).~~

["]Limited rights shall be effective until (insert date certain) [or production of a certain number of units], thereafter the limited rights will expire and the Government shall have unlimited rights in the technical data."

The restrictions governing the use and disclosure of technical data marked with this legend are set forth in the definition of "limited rights" in [the above-referenced contract, or subcontract if furnished by a subcontractor.] ~~paragraph (a)(15) above.~~ (For technical data which the parties have agreed will be subject to rights other than those described in the definitions of limited rights or GPLR in paragraph (a)(15) and (a)(14) above, insert the following statement:

"In addition to the ~~minimum~~ rights described in the definition of limited rights in DFARS clause at 252.227-7013, [(APR 1988),] the Government shall have the rights described in the license or agreement made a part of Contract No. _____."

This legend, together with the indications of the portions of this data which are subject to limited rights, shall be included on any reproduction hereof which includes any part of the portions subject to such limitations. This technical data will remain subject to limited rights only so long as

it remains "unpublished" as defined in [the above-referenced contract, or subcontract if furnished by a subcontractor.] ~~paragraph (a) above.~~

[End of Legend]

(c) Rights in Computer Software

(1) Restricted Rights

(i) The Government shall have restricted rights in computer software, listed or described in a license [or] agreement made a part of this contract, which the parties have agreed will be furnished with restricted rights. Notwithstanding any contrary provision in any such license agreement, the Government shall have the rights included in the definition of "restricted rights" in paragraph (a)(17) above. [Such restricted rights are of no effect unless] ~~unless~~ the computer software is marked by the Contractor with the following legend:

RESTRICTED RIGHTS LEGEND

Use, duplication or disclosure is subject to restrictions stated in Contract [or Subcontract] No. _____ with _____ (Name of Contractor [or Subcontractor]).

and the related computer software documentation includes a prominent statement of the restrictions applicable to the computer software, the Government shall [notify the party asserting the rights to correct the legend.] ~~have unlimited~~

~~rights in the software.~~ The contractor [or subcontractor] may not place any legend on computer software restricting the Government's rights in such software unless the restrictions are set forth in a license [or] agreement made a part of this contract [or subcontract] prior to the delivery date of the software. Failure of the contractor [or subcontractor] to apply a restricted rights legend to the computer software shall relieve the Government of liability with respect to the unmarked software.

(ii) Notwithstanding subparagraph (c)(1)(i) above, ~~commercial~~ computer software and related documentation developed at private expense and not in public domain may be marked with the following Legend:

RESTRICTED RIGHTS LEGEND

Use, duplication or disclosure by the Government is subject to restrictions as set forth in subparagraph (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at DFARS 252.227-7013.

[(APR 1988).]

(Name of [Party asserting the rights]
Contractor and Address)

When acquired by the Government, ~~commercial~~ computer software and related documentation so legended shall be subject to the following:

(A) Title to and ownership of the software and documentation shall remain with the contractor. [or subcontractor, as appropriate].

(B) User of the software and documentation shall be limited to the facility for which it is acquired.

(C) The Government shall not provide or otherwise make available the software or documentation, or any portion thereof, in any form, to any third party without the prior written approval of the contractor. [or subcontractor].
[Third parties do not include those specifically identified in the license or agreement.] ~~Third parties do not include prime contractors, subcontractors and agents of the Government who have the Government's permission to use the licensed software and documentation at the facility, and who have agreed to use the licensed software and documentation only in accordance with these restrictions.~~ This provision does not limit the right of the Government to use software, documentation, or information therein, which the Government has or may obtain without restrictions.

(D) The Government shall have the right to use the computer software and documentation with the computer for which it is acquired at any other facility to which that computer may be transferred; to use the computer software and documentation with a backup computer when the primary computer is inoperative; to copy computer programs for

safekeeping (archives) or backup purposes; and to modify the software and documentation or combine it with other software, [p]Provided, that the unmodified portions shall remain subject to these restrictions.

(2) Unlimited Rights. The Government shall have unlimited rights in:

(i) Computer software [delivered as an element of performance under a Government contract or subcontract requiring] ~~resulting directly from~~ performance of experimental, developmental or research work [, and not developed exclusively at private expense;] ~~which was specified as an element of performance in this or any other Government contract or subcontract,~~

(ii) Computer software required to be originated or developed under a Government contract, [, and not developed exclusively at private expense;] ~~or generated as a necessary part of performing a contract,~~

(iii) Computer data bases, [required as an element of performance under a Government contract or subcontract] ~~prepared under a Government contract,~~ consisting of information supplied by the Government, information in which the Government has unlimited rights, or information which is in the public domain;

(iv) Computer software prepared or required to be delivered under this or any other Government contract or

subcontract and constituting corrections or changes to Government-furnished computer software; and

(v) Computer software which is otherwise publicly available, or has been, or is normally released, or disclosed by the Contractor or subcontractor without restriction on further release or disclosure.

(d) Technical Data and Computer Software Previously Provided Without Restriction. Contractor shall assert no restrictions on the Government's rights to use or disclose any data or computer software which the Contractor has previously delivered to the Government without restriction. The limited or restricted rights provided for by this clause shall not impair the right of the Government to use similar or identical data or computer software acquired from other sources.

(e) Copyright.

(1) In addition to the rights granted under the provisions of paragraphs (b) and (c) above, the Contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world, of the scope set forth below, under any copyright owned by the Contractor, in any work of authorship prepared for or acquired by the Government under this contract, to reproduce the work in copies or phonorecords, to distribute copies or phonorecords to the public, to perform or display the work publicly, and to

prepare derivative works thereof, and to have others do so for Government purposes. With respect to technical data and computer software in which the Government has unlimited rights, the license shall be of the same scope as the rights set forth in the definition of "unlimited rights" in (a)(19) above. With respect to technical data in which the Government has limited rights, the scope of the license is limited to the rights set forth in the definition of "limited rights". With respect to computer software which the parties have agreed will be furnished with restricted rights, the scope of the license is limited to such rights.

(2) Unless written approval of the Contracting Officer is obtained, the Contractor shall not include (in technical data or computer software prepared for or acquired by the Government under this contract) any works of authorship in which copyright is not owned by the Contractor without acquiring for the Government any rights necessary to perfect a copyright license of the scope specified herein.

(3) The Contractor shall be considered the "person" for whom the work was prepared" for the purpose of determining authorship under 17 U.S.C. 201(b).

(4) Technical data delivered under this contract bearing a copyright notice shall also include the following statement:

This material may be reproduced or for the U.S. Government pursuant to the copyright license under the clause at DFARS 252.227-7013 ((APR 1988)]~~date~~).

(f) Removal of Unjustified and Nonconforming Markings.

(1) Unjustified Technical Data Markings. Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may, ~~at the Contractor's expense~~, correct, cancel, or ignore any marking not justified by the terms of this contract on any technical data furnished hereunder in accordance with the clause of this contract entitled "Validation of Restrictive Markings on Technical Data", DFARS 252.227-7037.

(2) Nonconforming Technical Data Markings. Correction of nonconforming markings is not subject to this clause. The Government may, ~~at the contractor's expense~~, correct any nonconforming markings if the Contracting Officer notifies the Contractor and the Contractor fails to correct the nonconforming markings within sixty (60) days.

(3) Unjustified and Nonconforming Computer Software Markings. Notwithstanding any provision of this contract [(or subcontract)] concerning inspection and acceptance, the Government may correct, cancel, or ignore any marking not authorized by the terms of this contract [(or subcontract)] on any computer software furnished hereunder, if:

(i) The contractor [(or subcontractor, as applicable)] fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the markings; or

(ii) The contractor's[(or subcontractor, as applicable)] response fails to substantiate, within sixty (60) days after written notice, the propriety of restricted rights markings.

In either case, the Government shall give written notice to the contractor [(or subcontractor, as applicable)] of the action taken. [within 2 months of taking the action or 1 year of making the challenge.]

(g) Relation to Patents. Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(h) Limitation on Charges for Data and Computer Software. The Contractor recognizes that the Government is not obligated to pay, or to allow to be paid, any charges for data or computer software which the Government has a right to use and disclose to others without restriction[,] and Contractor agrees to refund any such payments. This provision applies to contracts that involve payments by subcontractors and those entered into through the Military

Assistance Program, in addition to U.S. Government prime contracts. It does not apply to reasonable reproduction, handling, mailing, and similar administrative costs.

(i) Acquisition of Technical Data and Computer Software from Subcontractors.

(1) Whenever any technical data or computer software is to be obtained from a subcontractor under this contract, the contractor shall use this same clause in the subcontract, without alteration, and no other clause shall be used to enlarge or diminish the Government's or the contractor's rights in the subcontractor['s] data or computer software.

(2) Technical data required to be delivered by a subcontractor shall normally be delivered to the next higher-tier contractor. However, when there is a requirement in the prime contract for data which may be submitted with other than unlimited rights by a subcontractor, then said subcontractor may fulfill its requirement by submitting such data directly to the Government, rather than through the prime Contractor.

(3) The Contractor and higher-tier subcontractors will not use their power to award subcontracts as economic leverage to obtain rights in technical data or computer software from their subcontractors, [by violation of the prohibitions in 227.473-2(a)(b), or otherwise.]

(j) Notice of Limitations on Government Rights.

(1) The contractor shall notify the Contracting Officer of the contractor's or its potential subcontractor's use in the performance of the contract or subcontract of items, components, processes and computer software that--

- (i) Have been developed exclusively at private expense;
- (ii) Have been developed in part at private expense; or
- (iii) Embody technology that has been developed exclusively with Government funds which the contractor or subcontractor desires exclusive rights to commercialize, with Government approval.

(2) With respect to each item, component, process, or computer software identified in (j)(1)(ii) above, the contractor shall also notify the Contracting Officer of the total development cost known to the contractor of the item, component, process, or computer software and the percentage of the total development cost known to the contractor which was contributed by the contractor. [or subcontractor, as applicable.]

(3) Such notification is not required with respect to items, components, processes or computer software for which such notice was given pursuant to preaward notification of rights in technical data [(252.227-7035)] in connection with this contract.

(4) Such notification shall be accompanied by the appropriate listing and [notification] ~~certification~~ required by the clause at DFARS 252.227-7038.

(k) Identification of restrictions on Government rights.

Technical data and computer software shall not be tendered to the Government with other than unlimited rights, unless the technical data or computer software are contained in a listing made part of ~~this~~ [the prime] contract. [or acknowledge by the Contracting Officer on a similar list which is a part of a subcontract.] ~~This~~ [These] listing[s] ~~is~~ [are] intended to facilitate acceptance of the technical data and computer software by the Government and does not change, waive, or otherwise modify the rights or obligations of the parties under the clause at DFARS 252.227-7037. [However, the contractor or subcontractor has the right, as part of negotiations, to require the Government to initiate a challenge.] As a minimum, this listing must--

(1) Identify the items, components, processes, or computer software to which the restrictions on the Government apply;

(2) Identify or describe the technical data or computer software subject to other than unlimited rights; and

(3) Identify or describe, as appropriate, the category or categories of Government rights, the agreed-to time limitations, or any special restrictions on the use of [or] disclosure of the technical data or computer software.

(1) Postaward negotiation - Disputes. If, after exhausting all reasonable efforts, the parties fail to agree on the apportionment of the rights in technical data furnished under this contract by the date established in the contract for agreement, or within any extension established by the Contracting Officer, then the Contracting Officer may establish the respective data rights of the parties, subject to Contractor appeal as provided in the Disputes clause. In any event, the Contractor shall proceed with completion of the contract.

[If, after exhausting all reasonable efforts, a lower-tier subcontractor is unable to agree on the apportionment of the rights in technical data under it's subcontract, then such ~~the~~ subcontractor is relieved of its his obligation to deliver technical data required as a subcontract deliverable until such agreement is reached.]

(End of clause)

ALTERNATE I (APR. 1988)

As prescribed at 227.475-8, add the following paragraph to the basic clause:

(m) Publication for sale. If, prior to publication for sale by the Government and within the period designated in the contract or task order, but in no event later than twenty-four (24) months after delivery of such data, the Contractor publishes for sale any data (1) designated in the contract as being subject to this paragraph and (2) delivered under this contract, and promptly notifies the Contracting Officer of these publications, the Government shall not publish such data for sale or authorize others to do so. This limitation on the Government's right to publish for sale any such data so published by the Contractor shall continue as long as the data is protected as a published work under the copyright law of the United States and is reasonably available to the public for purchase. Any such publication shall include a notice identifying this contract and recognizing the license rights of the Government under this clause. As to all such data not so published by the Contractor, this paragraph shall be of no force or effect.

ALTERNATE II (APR 1988)

As prescribed at 227.479(d), substitute the following paragraphs (b) and (c) for the existing paragraphs (b) and (c) in the basic clause.

(b) Rights in Technical Data.

(1) Unlimited Rights. The Government is entitled to and will receive unlimited rights in:

(i) Form, fit, and function data pertaining to items, components, or processes prepared or required to be delivered under this or any other Government contract or subcontract;

(ii) Manuals or instructional materials (other than detailed manufacturing or process data) prepared or required to be delivered under this or any other contract or any subcontract hereunder necessary for installation, operation, maintenance, or training purposes;

(iii) Technical data prepared or required to be delivered under this or any other Government contract or subcontract and constituting corrections or changes to Government-furnished data; and

(iv) Technical data which is otherwise publicly available, or has been released or disclosed by the contractor or subcontractor, without restriction on further release or disclosure.

(2) Limited Rights. The Government shall have limited rights in:

[(i) Technical data listed or described in an agreement incorporated into the Schedule of this Contract, which the parties have agreed will be furnished with limited rights; and]

[[ii]](i) Unpublished technical data pertaining to items, components or processes developed exclusively at

private expense, and unpublished computer software documentation related to computer software that is acquired with restricted rights, other than such data included in (b)(1) above. Limited rights shall be effective provided that only the portion or portions of each piece of data to which limited rights are to be asserted are identified (for example, by circling, underscoring, or a note), and that the piece of data is marked with the legend below containing:

(A) the number of the prime contract [or subcontract, as applicable,] under which the technical data is to be delivered; and

(B) the name of the contractor and/or any subcontractor asserting limited rights.

LIMITED RIGHTS LEGEND

Contract No. _____

[Subcontract No. _____]

Contractor: _____

[Party asserting Data Rights: _____]

The restrictions governing the use of technical data marked with this legend are set forth in the definition of "Limited Rights" in DFARS clause at 252.227-7013. This legend, together with the indications of the portions of

this data, shall be included on any reproduction hereof which includes any part of the portions subject to limited rights. The limited rights legend shall be honored only as long as the data continues to meet the definition of limited rights.

(3) Government Purpose License Rights. For a period of two (2) years (or such other period as may be authorized by the Contracting Officer for good cause shown) after the delivery and acceptance of the last deliverable item under the contract, the Government shall have limited rights and, after the expiration of the two-year period, shall have Government purpose license rights in any technical data prepared or required to be delivered under this contract or subcontract hereunder, which is not otherwise subject to unlimited or limited rights pursuant to subparagraph (b)(1) or (b)(2) above. The Government shall not be liable for unauthorized use or disclosure of the data by third parties. Government Purpose License Rights shall be effective provided that only the portion or portions of each piece of data to which such rights are to be asserted are identified (for example, by circling, underscoring, or a note), and that the piece of data is marked with the legend below:

(A) the number of the prime contract under which the technical data is to be delivered; and

(B) the name of the contractor and/or any subcontractor asserting Government Purpose License Rights.

GOVERNMENT PURPOSE LICENSE RIGHTS (SBIR PROGRAM)

Contract No. _____.

Contractor: _____.

For a period of two (2) years after delivery and acceptance of the last deliverable item under the above contract, this technical data shall be subject to the restrictions contained in the definition of "Limited Rights" in DFARS clause at 252.227-7013. After the two-year period, the data shall be subject to the restrictions contained in the definition of "Government Purpose License Rights" in DFARS clause at 252.227-7013. The Government assumes no liability for unauthorized use or disclosure by others. This legend, together with the indications of the portions of the data which are subject to such limitations, shall be included on any reproduction hereof which contains any portions subject to such limitations and shall be honored only as long as the data continues to meet the definition on Government purpose license rights.

(c) Rights in Computer Software.(1) Restricted Rights.

(i) The Government shall have restricted rights in computer software, listed or described in a license [or]

agreement made a part of this contract, which the parties have agreed will be furnished with restricted rights. Notwithstanding any contrary provision in any such license [or] agreement, the Government shall have the rights included in the definition of "restricted rights" in paragraph (a)(17) above. [Such restricted rights are of no effect unless] ~~Unless~~ the computer software is marked by the Contractor with the following legend:

RESTRICTED RIGHTS LEGEND

Use, duplication or disclosure is subject to restrictions stated in Contract No. [or Subcontract] _____ with _____ (Name of Contractor [or Subcontractor]) _____.

and the related computer software documentation includes a prominent statement of the restrictions applicable to the computer software. The Government shall have unlimited rights in the software. The contractor [or subcontractor] may not place any legend on computer software indicating restrictions on the Government's rights in such software unless the restrictions are set forth in a license [or] agreement made a part of this contract [or subcontract] prior to the delivery date of the software. Failure of the contractor [or subcontractor] to apply a restricted rights legend to such computer software shall relieve the Government of liability with respect to this unmarked software.

(ii) Notwithstanding subparagraph (c)(1)(i) above, ~~commercial~~ computer software and related documentation developed at private expense and not in public domain may be marked with the following legend:

RESTRICTED RIGHTS LEGEND

Use, duplication or disclosure by the Government is subject to restrictions as set forth in subparagraph (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at DFARS 252.227-7013.

[(APR 1988)].

(Name of [Party asserting the Rights]
Contractor and Address)

When acquired by the Government, ~~commercial~~ computer software and related documentation so legended shall be subject to the following:

(A) Title to and ownership of the software and documentation shall remain with the contractor. [or subcontractor, as applicable.]

(B) User of the software and documentation shall be limited to the facility for which it is acquired.

(C) The Government shall not provide or otherwise make available the software or documentation, or any portion

thereof, in any form, to any third party without the prior written approval of the contractor. [or subcontractor, as applicable.] Third parties do not include [those specifically identified in the license or agreement.] ~~prime contractors, subcontractors and agents of the Government who have the Government's permission to use the licensed software and documentation at the facility, and who have agreed to use the licensed software and documentation only in accordance with these restrictions.~~ This provision does not limit the right of the Government to use software, documentation, or information therein, which the Government has or may obtain without restrictions.

(D) The Government shall have the right to use the computer software and documentation with the computer for which it is acquired at any other facility to which that computer may be transferred; to use the computer software and documentation with a backup computer when the primary computer is inoperative; to copy computer programs for safekeeping (archives) or backup purposes; and to modify the software and documentation or combine it with other software, [p]Provided, that the unmodified portions shall remain subject to these restrictions.

(2) Government Purpose License Rights. For a period of two (2) years (or such other period as may be authorized by the Contracting Officer for good cause shown) after the

delivery and acceptance of the last deliverable item under the contract, [or subcontract, as applicable,] the Government shall have restricted rights and, after expiration of the two-year period, shall have Government purpose license rights in:

(i) computer software resulting directly from performance of experimental, developmental or research work ~~which was specified as an element of performance in this or any Government contract or subcontract,~~ [and was not developed entirely at private expense;]

(ii) computer software required to be originated or developed under a Government contract, [and was not developed exclusively at private expense;] ~~or generated as a necessary part of performing a contract;~~ and

(iii) any other computer software required to be prepared or delivered under this contract or subcontract hereunder, which is not otherwise subject to restricted or unlimited rights pursuant to subparagraph (c)(1) or (c)(3) herein. Government purpose license rights shall be effective provided that each unit of software is marked with an abbreviated license rights legend reciting that the use, duplication, or disclosure of the software is subject to the same restrictions included in the same contract (identified by number) with the same contractor (identified by name). The Government assumes no liability for unauthorized use, duplication, or disclosure by others.

(3) Unlimited Rights. The Government shall have unlimited rights in:

(i) computer software required to be prepared or delivered under this [contract] or any subcontract hereunder that was previously delivered or previously required to be delivered to the Government under any contract or subcontract with unlimited rights; [and was not developed exclusively at private expense;]

(ii) computer software that is publicly available or has been or is normally released or disclosed by the Contractor [or subcontractor] without restriction on further use or disclosure; and

(iii) computer data bases, [required as an element of performance under a Government contract or subcontract,] consisting of information supplied by the Government, information in which the Government has unlimited rights, or information which is in the public domain.

252.227-7014 Reserved.

252.227-7015 Reserved.

252.227-7016 Reserved.

252.227-7017 Reserved.

252.227-7018 Restrictive Markings on Technical Data. As prescribed at 227.473-3(a), insert the following clause:
RESTRICTIVE MARKING ON TECHNICAL DATA (APR 1988)

(a) The Contractor shall have, maintain, and follow throughout the performance of this contract, written procedures sufficient to assure that restrictive markings are used only when authorized by the terms of the "Rights in Technical Data and Computer Software" clause of this contract. The Contractor shall also maintain a quality assurance system to assure compliance with this clause.

(b) As part of the procedures, the Contractor shall as a minimum:

(1) Maintain records to show how the procedures of paragraph (a) above were applied in determining that the markings are authorized;

(2) Maintain records sufficient to justify the validity of ~~any~~ restrictive markings [placed] on technical data [by the contractor and] delivered under this contract;

(3) Provide for review of subcontractor procedures for controlling the restrictive markings on technical data. Where appropriate, the Contractor may request Government assistance in evaluating subcontractor procedures; and

(4) Establish and maintain operating procedures and physical security designed to protect any technical data subject to other than unlimited rights from inadvertent or

unauthorized marking, disclosure or release to third parties.

(c) The Contractor shall, within sixty (60) days after award of this contract, identify in writing to the Contracting Officer by name or title the person(s) having the final responsibility within Contractor's organization for determining whether restrictive markings are to be placed on technical data to be delivered [by his organization] under this contract. The Government is authorized to contact such person(s) to resolve questions involving restrictive markings.

(d) The Contracting Officer may evaluate, verify and obtain a copy of the Contractor's procedures. The failure of the Contracting Officer to evaluate or verify such procedures shall not relieve the Contractor of the responsibility for complying with paragraphs (a) and (b) above.

(e) If the Contracting Officer gives written notification of any failure to maintain or follow the established procedures, or of any deficiency in the procedures, corrective action shall be accomplished within the [reasonable period of] time specified by the Contracting Officer.

(f) This clause shall be included in each subcontract under which technical data is required to be delivered. When so inserted, "Contractor" shall be changed to

"Subcontractor". [and "Government" or "Contracting Officer" to "higher tier contractor".]

(End of clause)

252.227-7019 Identification of Restricted Rights Computer Software.

As prescribed at 227.481, insert the following provision:

IDENTIFICATION OF RESTRICTED RIGHTS COMPUTER SOFTWARE

(APR 1988)

The Offeror is required to identify in his proposal, to the extent feasible, any such computer software which was developed at private expense and upon the use of which it desires to negotiate restrictions, and to state the nature of the proposed restrictions. Any restrictions on the Government's use or disclosure of computer software developed at private expense and to be delivered under the contract [should] ~~must~~ be set forth in an agreement made a part of the contract, either negotiated prior to award or included in a modification of the contract before such delivery. ~~If no such computer software is identified, all deliverable computer software will be subject to unlimited rights.~~

(End of provision)

252.227-7020 Rights in Data--Special Works.

As prescribed at 227.476(a), insert the following clause:

RIGHTS IN DATA--SPECIAL WORKS (MAR 1979)

(a) The term "works" as used herein includes literary, musical, and dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and works of similar nature. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) All works first produced in the performance of this contract shall be the sole property of the Government, which shall be considered the "person for whom the work was prepared" for the purpose of authorship in any copyrightable work under 17 U.S.C. 201(b), and the Government shall own all of the rights comprised in the copyright. The Contractor agrees not to assert or authorize others to assert any rights, or establish any claim to copyright, in such works. The Contractor, unless directed to the contrary by the Contracting Officer, shall place on any such works delivered under this contract the following notice:

c (Year date of delivery) United States
Government as represented by the
Secretary of (department). All
rights reserved.

In the case of a phonorecord, the c will be replaced by P.

(c) Except as otherwise provided in this contract, the Contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world (1) to reproduce in copies or phonorecords, to prepare derivative works, to distribute copies or phonorecords, and to perform or display publicly any portion of a work which is not first produced in the performance of this contract but in which copyright is owned by the Contractor and which is incorporated in the work furnished under this contract, and (2) to authorize others to do so for Government purposes.

(d) Unless written approval of the Contracting Officer is obtained, the Contractor shall not include in any works prepared for or delivered to the Government under this contract any works of authorship in which copyright is not owned by the Contractor or the Government without acquiring for the Government any rights necessary to perfect a license of the scope set forth in paragraph (c) above.

(e) The Contractor shall indemnify and save and hold harmless the Government, and its officers, agents and employees acting for the Government, against any liability, including costs and expenses, (1) for violation of proprietary rights, copyrights, or rights of privacy or publicity, arising out of the creation, delivery, or use of any works furnished under this contract, or (2) based upon

any libelous or other unlawful matter contained in such works.

(f) Nothing contained in this clause shall imply a license to the Government under any patent, or be construed as affecting the scope of any license of other rights otherwise granted to the Government under any patent.

(g) Paragraphs (c) and (d) above are not applicable to material furnished to the Contractor by the Government and incorporated in the work furnished under the contract; Provided, such incorporated material is identified by the Contractor at the time of delivery of such work.

(End of clause)

252.227-7021 Rights in Data--Existing Works.

As prescribed at 227.477(b), insert the following clause:

RIGHTS IN DATA--EXISTING WORKS (MAR 1979)

(a) The term "works" as used herein includes literary, musical, and dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and works of a similar nature. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) Except as otherwise provided in this contract, the Contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world (1) to distribute, perform publicly, and display publicly the works called for under this contract and (2) to authorize others to do so for Government purposes.

(c) The Contractor shall indemnify and save and hold harmless the Government, and its officers, agents, and employees acting for the Government, against any liability, including costs and expenses, (1) for violation of proprietary rights, copyrights, or rights of privacy or publicity arising out of the creation, delivery, or use, of any works furnished under this contract, or (2) based upon any libelous or other unlawful matter contained in same works.

(End of clause)

252.227-7022 Government Rights (Unlimited).

As prescribed at 227.478-2(a)(1)(i), insert the following clause:

GOVERNMENT RIGHTS (UNLIMITED) (MAR 1979)

The Government shall have unlimited rights, in all drawings, designs, specifications, notes and other works developed in the performance of this contract, [which are required as an element of performance under this contract, and are not developed entirely at private expense,] inclu-

ding the right to use same on any other Government design or construction without additional compensation to the Contractor. The Contractor hereby grants to the Government a paid-up license throughout the world to all such works to which he may assert or establish any claim under design patent or copyright laws. The Contractor for a period of three (3) years after completion of the project agrees to furnish the original or copies of all such works on the request of the Contracting Officer.

(End of clause)

252.227-7023 Drawings and Other Data to Become Property of Government.

As prescribed at 227.478-2(a)(1)(ii), insert the following clause:

**DRAWINGS AND OTHER DATA TO BECOME PROPERTY OF GOVERNMENT
(MAR 1979)**

All designs, drawings, specifications, notes and other works developed in the performance of this contract shall become the sole property of the Government and may be used on any other design or construction without additional compensation to the Contractor. The Government shall be considered the "person for whom the work was prepared" for the purpose of authorship in any copyrightable work under 17 U.S.C. 201(b). With respect thereto, the Contractor agrees

not to assert or authorize others to assert any rights nor establish any claim under the design patent or copyright laws. The Contractor for a period of three (3) years after completion of the project agrees to furnish all retained works on the request of the Contracting Officer. Unless otherwise provided in this contract, the Contractor shall have the right to retain copies of all works beyond such period.

(End of clause)

252.227-7024 Notice and Approval of Restricted Designs.

As prescribed at 227.478-5, insert the following clause:

NOTICE AND APPROVAL OF RESTRICTED DESIGNS (APR 1984)

In the performance of this contract, the Contractor shall, to the extent practicable, make maximum use of structures, machines, products, materials, construction methods, and equipment that are readily available through Government or competitive commercial channels, or through standard or proven production techniques, methods, and processes. Unless approved by the Contracting Officer, the Contractor shall not produce a design or specification that requires in this construction work the use of structures, products, materials, construction equipment, or processes that are known by the Contractor to be available only from a

sole source. The Contractor shall promptly report any such design or specification to the Contracting Officer and give the reason why it is considered necessary to so restrict the design or specification.

(End of clause)

252.227-7025 Reserved.

252.227-7026 Deferred Delivery of Technical Data or Computer Software.

As prescribed at 227.475-2(b), insert the following clause:

**DEFERRED DELIVERY OF TECHNICAL DATA OR COMPUTER SOFTWARE
(APR 1988)**

The Government shall have the right to require, at any time during the performance of this contract, within two (2) years after either acceptance of all items (other than data or computer software) to be delivered under this contract or termination of this contract, whichever is later, delivery of any technical data or computer software item identified [on the DD 1423] ~~in this contract~~ as "deferred delivery" data or computer software. The obligation to furnish such technical data required to be prepared by a subcontractor and pertaining to an item obtained from him shall expire two (2) years after the date Contractor accepts the last

delivery of that item from that subcontractor for use in performing this contract.

(End of clause)

252.227-7027 Deferred Ordering of Technical Data or Computer Software.

As prescribed at 227.475-2(c), insert the following clause:

**DEFERRED ORDERING OF TECHNICAL DATA OR COMPUTER SOFTWARE
(APR 1988)**

In addition to technical data or computer software specified elsewhere in this contract to be delivered hereunder, the Government may, at any time during the performance of this contract or within a period of three (3) years after acceptance of all items (other than technical data or computer software) to be delivered under this contract or the termination of this contract, order any technical data or computer software [required and paid for as an element of performance under the Government contractor or subcontract.] ~~generated in the performance of this contract or any subcontract hereunder.~~ When the technical data or computer software is ordered, the Contractor shall be compensated for converting the data or computer software into the prescribed form, for reproduction and delivery. The obligation to deliver the technical data of a subcontractor and per-

taining to an item obtained from him shall expire three (3) years after the date the Contractor accepts the last delivery of that item from that subcontractor under this contract. The Government's rights to use said data or computer software shall be pursuant to the "Rights in Technical Data and Computer Software" clause of this contract.

(End of clause)

**252.227-7028 Requirement for Technical Data [Notification]
~~Certification.~~**

As prescribed at ~~227.473-4(a)~~ [227.473-1(a)(4)], insert the following provision:

**REQUIREMENT FOR TECHNICAL DATA [NOTIFICATION] CERTIFICATION
(APR 1988)**

The Offeror shall submit with its offer [its notification and those of its subcontractors] ~~a certification~~ as to whether the Offeror [or its proposed subcontractors] has delivered or is obligated to deliver to the Government under any contract or subcontract the same or substantially the same technical data with other than unlimited rights included in its offer; if so, the [offer] ~~Offeror~~ shall identify:

(a) One existing contract or subcontract under which the technical data were delivered or will be delivered, and the place of delivery; and

(b) The limitation on the Government's right to use the data, including identification of the earliest date the limitation expires— [, if any.]

(End of provision)

252.227-7029 Identification of Technical Data.

As prescribed at 227.473-3(a), insert the following clause:

IDENTIFICATION OF TECHNICAL DATA (MAR 1975)

Technical data delivered under this contract shall be marked with the number of this contract, name of Contractor, and name of any subcontractor who generated the data.

(End of clause)

252.227-7030 Technical Data--Withholding of Payment.

As prescribed at 227.473-5(b), insert the following clause:

TECHNICAL DATA--WITHHOLDING OF PAYMENT (APR 1988)

(a) If technical data specified to be delivered under this contract, is not delivered within the time specified by this contract or is deficient upon delivery ~~(including having restrictive markings not specifically authorized by this contract)~~, the Contracting Officer may until such data is accepted by the Government, withhold payment to the Contractor of ten percent (10%) of the ~~total contract~~ price

[of the deficient data] or amount unless a lesser withholding is [deemed appropriate by the contracting officer.] ~~specified in the contract.~~ [After the deficiency causing the withholding is corrected (or after expiration of 6 months) the contracting officer shall pay the amount withheld. If the Government suffered permanent damages, a separate action may be commenced to recover those damages.] Payments shall not be withheld nor any other action taken pursuant to this paragraph when the Contractor's failure to make timely delivery or to deliver such data without deficiencies arises out of causes beyond the control and without the fault or negligence of the Contractor.

(b) After payments total ninety percent (90%) of the total contract price or amount and if all technical data specified to be delivered under this contract has not been accepted, the Contracting Officer may withhold from further payment such sum as the Contracting Officer considers appropriate, unless a lesser withholding limit is specified in the contract. [After the deficiency causing the withholding is corrected (or after expiration of 6 months) the contracting officer shall pay the amount withheld. If the Government suffered permanent damages, a separate action shall be commenced to recover those damages.]

(c) The withholding of any amount or subsequent payment to the Contractor shall not be construed as a waiver

of any rights accruing to the Government under this contract.

(End of clause)

252.227-7031 Data Requirements.

As prescribed at 227.475-1[(a)], insert the following clause:

DATA REQUIREMENTS (APR 1988)

The Contractor is required to deliver the data items listed on the DD Form 1423 (Contract Data Requirements List)[.] ~~and data items identified in and deliverable under any contract clause of FAR Subpart 52.2 and DoD FAR Supplement Subpart 252.2 made a part of the contract.~~

(End of clause)

252.227-7032 Rights in Technical Data and Computer Software (Foreign).

As prescribed at 227.475-5, insert the following clause:

**RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE (FOREIGN)
(JUN 1975)**

The United States Government may duplicate, use, and disclose in any manner for any purposes whatsoever, including delivery to other governments for the furtherance of mutual defense of the United States Government and other

governments, all technical data including reports, drawings and blueprints, and all computer software, specified to be delivered by the [foreign] Contractor to the United States Government under this contract.

(End of clause)

252.227-7033 Rights in Shop Drawings.

As prescribed at 227.478-2,(a)(2), insert the following clause:

RIGHTS IN SHOP DRAWINGS (APR 1966)

(a) Shop drawings for construction means drawings, submitted to the Government by the Construction Contractor, subcontractor or any lower-tier subcontractor pursuant to a construction contract, showing in detail (i) the proposed fabrication and assembly of structural elements and (ii) the installation (i.e., form, fit, and attachment details) of materials or equipment. The Government may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

(b) This clause, including this paragraph (b), shall be included in all subcontracts hereunder at any tier.

(End of clause)

252.227-7034 Patents--Subcontracts.

As prescribed at 227.478-4, insert the following clause:

RIGHTS IN SHOP DRAWINGS (APR 1966)

The Contractor will include the clause at FAR 52.227-12, Patent Rights--Retention by the Contractor (Long Form), suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental, or research work to be performed by other than a small business firm or nonprofit organization.

(End of clause)

252.227-7035 Preaward Notification of Rights in Technical Data and Computer Software.

As prescribed at 227.473-1(a)(2), insert the following provision:

PREAWARD NOTIFICATION OF RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE (APR 1988)

(a) The Offeror shall in its response to this solicitation, notify [to the extent feasible] the Contracting Officer of the Offeror's or its potential subcontractor's proposed use of items, components, processes and computer software in the performance of the contract that--

- (1) Have been developed exclusively at private expense;
- (2) Have been developed in part at private expense; or
- (3) Embody technologies that have been developed exclusively with Government funds which the Contractor or

subcontractor requests the Government to grant commercial exclusive rights.

(b) With respect to each item, component, process, or computer software identified in (a)(ii)[2] above, the Contractor shall also notify the Contracting Officer of the total development cost known to the Contractor of the item, component, process, or computer software and the percentage of the total development cost known to the Contractor which was contributed by the Contractor. This notification shall be accompanied by the appropriate ~~certification~~ [notification] at DFARS 252.227-7038.

~~(c) If the Offeror asserts other than unlimited rights to any technical data in its proposal responding to this requirement, Government failure to object to or reject any such assertion shall not be construed to constitute agreement to any such data rights assertion. Offerors will furnish, at the written request of the Contracting Officer, evidence [justification] to support any such assertion. Such notification shall be accompanied by the appropriate~~
~~certification~~ [notification] at DFARS 252.227-7038.

(End of provision)

252.227-7036 Certification of Technical Data Conformity.

As prescribed at 227.473-5, insert the following clause:

CERTIFICATION OF TECHNICAL DATA CONFORMITY (MAY 1987)

(a) All technical data delivered under this contract shall be accompanied by the following written certification:

[CERTIFICATION OF TECHNICAL DATA CONFORMITY]

The Contractor, _____, hereby certifies that, to the best of its knowledge and belief, the technical data delivered herewith under Contract [(or subcontract, as appropriate)] No. _____ is complete, accurate, and complies with ~~all~~ [the technical data] requirements of ~~the~~ [its] contract.

[(or subcontract, as appropriate).]

Date _____

[This certification shall expire and be of no force and effect three (3) years after the below delivery date.]

Name and Title of

Certifying Official _____

This written certification shall be dated and the certifying official (identified by name and title) shall be duly authorized to bind the Contractor by the certification.

(b) The Contractor shall identify, by name and title, each individual (official) authorized by the Contractor to certify in writing that the technical data is complete, accurate, and complies with ~~all~~ [the technical data]

requirements of ~~the~~ [its] contract. The Contractor hereby authorizes direct contact with the authorized individual responsible for certification of technical data. The authorized individual shall be familiar with the Contractor's technical data conformity procedures and their application to the technical data to be certified and delivered.

(c) Technical data delivered under this contract may be subject to reviews by the Government during preparation and prior to acceptance. Technical data is also subject to reviews by the Government subsequent to acceptance. Such reviews may be conducted as a function ancillary to other reviews, such as in-process reviews or configuration audit reviews.

(End of clause)

252.227-7037 Validation of Restrictive Markings on Technical Data.

As prescribed at 227.473-4(a), insert the following clause:

VALADATION OF RESTRICTIVE MARKINGS ON TECHNICAL DATA (APR 1988)

(a) Definitions.

[(i)] ~~The~~ [T]erms used in this clause [except as provided in (ii) below] are defined in the clause at DFARS 252.227-7013 of the Department of Defense Federal Acquisition Regulation Supplement (DFARS).

[(ii) "Reasonable grounds", as used in this clause, means that the finding required of the contracting officer must make it more likely than not - leaving virtually no doubt - that the restrictive marking asserted was not justified by contractor or subcontract or by proof of private development of the technical data. A contractor's or subcontractor's failure to respond to a prechallenge request does not satisfy the reasonable grounds required.]

(b) Justification.

The Contractor or subcontractor at any tier is responsible for maintaining records [for three years after delivery to their next higher tier contractor] sufficient to justify the validity of its markings [on technical data required to be delivered as an element of performance under a Government contract or subcontract] that impose restrictions on the Government and others to use, duplicate, or disclose technical data delivered or required to be delivered under the contract or subcontract, and shall be prepared to furnish to the Contracting Officer a written justification for such restrictive markings in response to a challenge under paragraph (d) below.

(c) Prechallenge Request for Information.

(1) The Contracting Officer may request the Contractor or subcontractor to furnish a written explanation for any restriction asserted by the Contractor or subcontractor on

the right of the United States or others to use technical data-- [delivered as an element of performance under a Government contract or subcontract. Such request must be made before the end of the three year period beginning on the date on which final payment is made on a contract or subcontract under which technical data is required to be delivered, or the date on which technical data is delivered under such contract, whichever is later.] If, upon review of the explanation submitted, the Contracting Officer remains unable to ascertain the basis of the restrictive marking, the Contracting Officer may further request the Contractor or subcontractor to furnish [specific] additional information in the records of, or otherwise in the possession of or reasonably available, to, the Contractor or subcontractor to justify the validity of any restrictive marking on technical data delivered or to be delivered under the contract or subcontract (e.g. a statement of facts accompanied with supporting documentation). The Contractor or subcontractor shall submit such written data as requested by the Contracting Officer within the [reasonable] time required or such longer period as may be mutually agreed.

(2) If the Contracting Officer, after reviewing the written data furnished pursuant to paragraph (c)(1) above, or any other available information pertaining to the vali-

dity of a restrictive marking, determines that reasonable grounds exist to question the current validity of the marking and that continued adherence to the marking would make impracticable the subsequent competitive acquisition of the item, component, or process to which the technical data relates, the Contracting Officer shall follow the procedures in (d) below. [If the Contracting Officer determines that reasonable grounds do not exist to question the validity of the marking, the contracting officer shall promptly so inform the contractor or subcontractor.]

(3) If the Contractor or subcontractor fails to respond to the Contracting Officer's request for information under paragraph (c)(1) above, and the Contracting Officer determines that [reasonable grounds are found to challenge the current validity of restrictive markings from available information, and] continued adherence to the marking would make impracticable the subsequent competitive acquisition of the item, component, or process to which the technical data relates, the Contracting Officer may challenge the validity of the marking as described in paragraph (d) below.

(d) Challenge.

(1) Notwithstanding any provision of this contract concerning inspection and acceptance, if the Contracting Officer determines [at any time before the end of the three-year period beginning on the date on which final payment is

made on a contract under which technical data is required to be delivered, or the date on which the technical data is delivered under such contract, whichever is later,] that a challenge to the restrictive marking is warranted, the Contracting Officer shall [within three years] send a written challenge notice to the Contractor or subcontractor asserting the restrictive markings. Such challenge shall:

(i) State the specific [reasonable] grounds for challenging the asserted restriction;

(ii) Require a response within sixty (60) days justifying ~~and providing sufficient evidence as to~~ the current validity of the asserted restriction; and

(iii) State that a DoD Contracting Officer's final decision, issued pursuant to paragraph (f) below, sustaining the validity of a restrictive marking identical to the asserted restriction, within the three-year period preceding the challenge, shall serve as justification for the asserted restriction if the validated restriction was asserted by the same Contractor or subcontractor (or any licensee of such Contractor or subcontractor) to which such notice is being provided.

(iv) State that failure to respond to the challenge notice may result in issuance of a final decision pursuant to paragraph (e) below.

(2) The Contracting Officer shall extend the time for response as appropriate if the Contractor or subcontractor

submits a written request showing the need for additional time to prepare a response.

~~(3) The Contractor's or subcontractor's written response shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601 et seq.), and shall be certified in the form prescribed by FAR 33.207, regardless of dollar amount.~~

[3]~~(4)~~ A Contractor or subcontractor receiving challenges to the same restrictive markings from more than one Contracting Officer shall notify each Contracting Officer of the existence of more than one challenge. The notice shall also state which Contracting Officer initiated the first in time unanswered challenge. The Contracting Officer initiating the first in time unanswered challenge after consulting with the Contractor or subcontractor and the other Contracting Officers, shall formulate and distribute a schedule for responding to each of the challenge notices to all interested parties. The schedule shall afford the Contractor or subcontractor an opportunity to respond to each challenge notice. ~~All parties will be bound by this schedule.~~

[(4) If the contractor or subcontractor determines that the Contracting Officer's determination to challenge is not adequately supported by specific reasonable grounds, he shall so indicate to the Contracting Officer in writing.

This notification of a disputed challenge shall specifically identify the nature of the inadequacy of the Contracting Officer's validation challenge notice.

The Contracting Officer may provide specific reasonable grounds or notify the contractor or subcontractor that the original challenge notice is deemed adequate. In either event the original 60 day challenge notice period is automatically stayed upon serving the Contracting Officer with a disputed challenge notice. A new 60 day challenge notice period will begin when the contracting officer provides specific reasonable grounds or notifies the contractor or subcontractor that the original challenge notice is deemed adequate.

If the contractor or subcontractor still believes that the contracting officer's challenge notice is inadequate, he may appeal the adequacy of the notice to a third party designated within each agency appointed by that agency's Board of Contract Appeals. Such appeal shall stay the new 60 day time period commencing when the Contracting Officer responds (providing additional grounds or deeming his original challenge notice adequate). Such stay shall remain in effect until the third party renders a determination and so notifies the contractor or subcontractor.

If the third party determination substantiates the adequacy of the Contracting Officer's original challenge

notice, the contractor or subcontractor must respond to the Contracting Officer's challenge within 60 days of such notification.

If the third party determination does not substantiate the adequacy of the Contracting Officer's original challenge notice, the Contracting Officer's notice is cancelled.]

(e) Final Decision When Contractor or Subcontractor Fails to Respond. ~~Upon a failure of a Contractor or subcontractor to submit any response to the challenge notice, the Contracting Officer will issue a final decision to the Contractor or subcontractor in accordance with the Disputes clause at FAR 52.233-1, pertaining to the validity of the asserted restriction.~~ This ~~final~~ decision shall be [based on the information available to the Contracting Officer (not the contractor's or subcontractor's failure to respond) and] issued as soon as possible after the expiration of the time period of paragraph (d)(1)(ii) or (d)(2) above. Following the issuance of the ~~final~~ decision, the Contracting Officer will comply with the procedures in (f)(2)(ii) through (iv) below.

(f) Final Decision When Contractor or Subcontractor Responds.

(1) If the Contracting Officer determines that the Contractor or subcontractor has justified the validity of the restrictive marking, the Contracting Officer shall issue

a final decision to the Contractor or subcontractor sustaining the validity of the restrictive marking, and stating that the Government will continue to be bound by the restrictive marking. This final decision shall be issued within sixty (60) days after receipt of the Contractor's or subcontractor's response to the challenge notice, or within such longer period that the Contracting Officer has notified the Contractor or subcontractor that the Government will require. The notification of a longer period for issuance of a final decision will be made within sixty (60) days after receipt of the response to the challenge notice. [A failure to notify within 60 days by the Government is deemed to mean that the restrictive marking is justified.]

(2)(i) If the Contracting Officer determines that the validity of the restrictive marking is not justified, the Contracting Officer shall issue a final decision to the Contractor or subcontractor in accordance with the Disputes clause at FAR 52.233-1. Notwithstanding paragraph (e) of the Disputes clause, the final decision shall be issued within sixty (60) days after receipt of the Contractor's or subcontractor's response to the challenge notice, or within such longer period that the Contracting Officer has notified the Contractor or subcontractor of the longer period that the Government will require. The notification of a longer period for issuance of a final decision will be made within

sixty (60) days after receipt of the response to the challenge notice. [A failure to notify within 60 days by the Government is deemed to mean that the restrictive marking is justified.]

(ii) The Government agrees that it will continue to be bound by the restrictive marking for a period of ninety (90) days from the issuance of the Contracting Officer's final decision under paragraph (f)(2)(i) of this clause. The Contractor or subcontractor agrees that, if it intends to file suit in the United States Claims Court it will provide a notice of intent to file suit to the Contracting Officer within ninety (90) days from the issuance of the Contracting Officer's final decision under paragraph (f)(2)(i) of this clause. If the Contractor or subcontractor fails to appeal, file suit, or provide a notice of intent to file suit to the Contracting Officer within the ninety (90)-day period, the Government may [will] cancel or ignore the restrictive markings, [.] ~~and the failure of the Contractor or subcontractor to take the required action constitutes agreement with such Government action.~~

(iii) The Government agrees that it will continue to be bound by the restrictive marking where a notice of intent to file suit in the United States Claims Court is provided to the Contracting Officer within ninety (90) days from the issuance of the final decision under paragraph (f)(2)(i) of

this clause. The Government will no longer be bound, ~~and the Contractor or subcontractor agrees that the Government may strike or ignore the restrictive markings,~~ if the Contractor or subcontractor fails to file its suit within one (1) year after issuance of the final decision. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, that urgent or compelling circumstances will not permit waiting for the filing of a suit in the United States Claims Court, ~~the Contractor or subcontractor agrees that the agency may,~~ following notice to the Contractor or subcontractor, [the Government will] authorize release or disclosure of the technical data. [Such notice shall provide the specific findings of fact and conclusions supporting the agency head determinations.] Such agency determination may be made at any time after issuance of the final decision and will not affect the Contractor's or subcontractor's right to damages against the United States where its restrictive markings are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(iv) The Government agrees that it will be bound by the restrictive marking where an appeal or suit is filed pursuant to the Contract Disputes Act until final disposition by an agency Board of Contract Appeals or the United States Claims Court. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable

basis, following notice to the Contractor that urgent or compelling circumstances will not permit awaiting the decision by such Board of Contract Appeals or the United States Claims Court, ~~the Contractor or subcontractor agrees that~~ the agency ~~may~~ [will] authorize release or disclosure of the technical data. [Such notice shall provide the specific findings of fact and conclusions supporting the agency head determination.] Such agency determination may be made at any time after issuance of the final decision and will not affect the Contractor's or subcontractor's right to damages against the United States where its restrictive markings are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(g) Final Disposition of Appeal or Suit.

(1) If the Contractor or subcontractor appeals or files suit and if, upon final disposition of the appeal or suit, the Contracting Officer's decision is sustained--

(i) The restrictive marking on the technical data shall be cancelled, corrected or ignored; and

(ii) If the restrictive marking is found not to be substantially justified, the Contractor or subcontractor, as appropriate, shall be liable to the Government for payment of the cost to the Government of reviewing the restrictive marking and the fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Government in

challenging the marking, unless special circumstances would make such payment unjust.

(2) If the Contractor or subcontractor appeals or files suit and if, upon final disposition of the appeal or suit, the Contracting Officer's decision is not sustained--

(i) The Government shall continue to be bound by the restrictive marking; and

(ii) The Government shall be liable to the Contractor or subcontractor for payment of fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Contractor or subcontractor in defending the marking, if the challenge by the Government is found not to have been made in good faith.

(h) Duration of Right to Challenge. The Government may review the validity of any restriction on technical data, delivered or to be delivered under a contract, asserted by the Contractor or subcontractor. [Any request for information from a contractor or subcontractor shall clearly indicate whether the Government has a right to challenge the propriety of the legend marking and the specific grounds therefore.] During the period within three (3) years of final payment on a contract or within three (3) years of delivery of the technical data [to the next higher tier contractor] ~~to the Government~~, whichever is later, the Contracting Officer may review and make a written determina-

tion to challenge the restriction. The Government may, however, challenge a restriction on the release, disclosure or use of technical data at any time if such technical data (1) is publicly available; (2) has been furnished to the United States without restriction; or (3) has been otherwise made available without restriction. ~~Only the Contracting Officer's final decision resolving a formal challenge by sustaining the validity of a restrictive marking constitutes "validation" as addressed in 10 U.S.C. 2321. A decision by the Government, or a determination by the Contracting Officer, to not challenge the restrictive marking or asserted restriction shall not constitute "validation".~~

(i) Privity of Contract. ~~The Contractor or subcontractor agrees that~~ [T]he Contracting Officer may transact matters under this clause directly with subcontractors at any tier that assert restrictive markings. However, this clause neither creates nor implies privity of contract between the Government and subcontractors.

(j) Flowdown. The Contractor or subcontractor agrees to insert this clause in subcontracts at any tier requiring the delivery of technical data.

(End of clause)

252.227-7038 Listing and ~~Certification~~ [Notification] of Development of Technology with Private Funding.

As prescribed at 227.473-1(a)(4)[(ii)], insert the following clause:

LISTING AND CERTIFICATION [NOTIFICATION] OF DEVELOPMENT OF TECHNOLOGY WITH PRIVATE FUNDING (APR 1988)

(a) All technical data pertaining to the items, components, processes, and computer software identified on the listing attached to this ~~certification~~ [notification] shall be subject to the written ~~certification~~ [notification] below. Upon request by the Contracting Officer, the Contractor shall provide ~~sufficient~~ [reasonable] descriptive information to ~~enable~~ the Contracting Officer to identify and evaluate the Contractor's assertions.

CERTIFICATION [NOTIFICATION] OF DEVELOPMENT OF TECHNOLOGY WITH PRIVATE FUNDING

(1) The Offeror/Contractor [notifies the Government of the following:] ~~certifies that, to the best of its knowledge and belief, the following information is current, accurate and complete.~~

(i) Identification of items, components, processes and computer software which the Offeror/Contractor intends to use in the performance of the contract which were developed exclusively at private expense[.] ~~if the unpublished technical data pertaining thereto will be~~

~~delivered to the Government marked with other than unlimited rights.~~

(ii) Identification of items, components, processes and computer software which the Offeror/Contractor intends to use in the performance of the contract which were developed in part at private expense if the unpublished technical data pertaining thereto will be delivered to the Government marked with other than unlimited rights.

~~(iii) Development cost contributed by the Offeror/Contractor for each item, component, process, and computer software identified in (1)(ii) above.~~

~~(iv) Percentage of total development cost known to the Offeror/Contractor contributed by the Offeror/Contractor for each item, component, process and computer software identified in (1)(ii) above.~~

~~(2) Except for technical data pertaining to items, components, processes, or computer software for which notice will be provided pursuant to DFARS 252.227-7013(j), all other technical data will be delivered to the Government subject to unlimited rights.~~

~~(3) Date _____~~

~~Name and Title of~~

~~Certifying Official _____~~

This written [notification] ~~certification~~ shall be dated[.] ~~and the certifying official (identified by name and title)~~ shall be duly authorized to bind the Contractor.

~~(End of certificate)~~

(End of provision)

PART 227 - PATENTS, DATA AND COPYRIGHTS

Index - does not include "Subpart 252 Clauses", starting with 252.227-7013 through - 7038, on pages 46 - 101. At the minimum, they should be indexed somewhere.

227.470

P.L. 99-500 does not grant rights in technical data unless the data is "procured" by the DoD.

227.471

"Commercial Computer Software". The preference for Non-Developmental items (which commercial computer software is) does not contain the restrictive conditions "regularly" and "in significant quantities" and "at established market or catalog prices", which is stricken. These limitations emasculate DFARS 10.001 and 10.002, changed 3/3/87 per DAR Case 86-159. Also see Public Law 99-500, Sec. 907 (codified at 10 U.S.C. 2325).

227.471

"Computer", "Computer Data Base", "Computer Program", "Computer Software" and "Computer Software Documentation". We believe that we do not have sufficient expertise to comment on the specialized computer related definitions and provisions, especially in view of the absence of 227.481 from these regulations.

227.471

"Detailed design data" - This data is developed to record the design. It is not created to produce (ie., manufacture) an end item or component. Normally another set of data is used from which the end item is produced. The creator of this data can not "ensure" that the end item will be "essentially identical" to the original.

227.471

"Developed" - We encourage reference to our PIA paper entitled "An Analysis of the Technical Data Rights Terminology Developed at Private Expense (and What It Should Mean)" October 1986, submitted as Appendix B to our DAR Case 84-87 Comments of 2/16/87. The 1985 Bell Textron case does not require a prototype 100% of the time [85-3 BCA 18,415 at 92,421-22].

See the 1986 Packard Report, Appendix I, Section IV, Regulations, p. 121. They suggest the additional language at the end of the 3rd sentence.

"On the commercial market" is an unnecessary restriction. If the item is otherwise "developed" for a military application, it should be accorded the same protection as if developed for a commercial market.

227.471

"Developed Exclusively with Government Funds" - As written, the meaning of "directly paid" escapes us. Does it mean the Government delivered a check to the developer? Definitions are supposed to clarify. Our suggestion does.

The "or" must be changed to "and" if there is to be any true reference to "who" paid for the development. If a dual test is provided, the Government could claim rights in a contractor or subcontractor's item, component or process that was developed exclusively with private funds because the development was required in "a" Government contract at some time or another (perhaps never even entered into by the developer of the data). The proposed disjunctive definition is entirely inappropriate here.

227.471

"Developed Exclusively at Private Expense" - As in the preceding definition, the second half of the definition is plainly unrelated to the phrase being defined. If the development was not required as an element of performance under a Government contract or subcontract, the contractor or subcontractor must have paid for the

development. Thus, the second half of the definition has no significance except to completely undercut the intent of the first half of the definition. Additionally, the dual definition leaves room for mischief. See our example regarding the definition of "Developed Exclusively with Government Funds" directly above.

Analytically, it is useful to insert the proposed definition language "was not required as an element of performance under a Government contract or subcontract" into the first sentence of this definition, leaving out the less important words and phrases. So simplified it states:

"'Developed Exclusively at Private Expense'... means...that no part of the cost of development was paid for by the Government or that the development was not...(specified in a Government contract or subcontract or that the development was necessary for performance of a Government contract or subcontract.)"

This analytical technique demonstrates that for an item to be "Developed Exclusively at Private Expense" under the proposed definition it must satisfy all 3 of the following criteria:

1. use no Government funds; and
2. development not be specified in a Government contract or subcontract; and

3. development not be necessary for performance of a Government contract or subcontract.

In addition to PIA's objection to criterion 2 above, PIA strongly objects to criterion 3. Most subcontractors are being encouraged to apply their technological expertise to solving a wide variety of technical problems on the latest military programs at their own expense. Many of these developments are necessary for performance of the prime contract or higher-tier subcontracts. Applying this definition, the Government can claim that these items were not developed exclusively at private expense.

Addition of the word "direct" in the first sentence is expressly suggested in the legislative history (ie. U.S. House/Senate Conference Report) to Public Law 99-500, Section 953, which says: "In addition, the conferees agree that as a matter of general policy at 'private expense' development was accomplished without direct Government payment. Payments by the Government to reimburse a contractor for its indirect costs would not be considered in determining whether the Government had funded the development of an item." (emphasis added). PIA believes the DAR Council is ignoring the express directions of Congress.

The last two sentences of the definition suffer from the same problem discussed above and are stricken accordingly. The meaning of "Developed Exclusively at Private Expense" should not be inconsistent with its plain words. The remaining explanations merely give meaning to the plain words.

In the absence of a specific recognition in these regulations that "separate" items of baseline technology forming a part of a larger end-item qualify as "Developed Exclusively At Private Expense", the Government, prime contractor and subcontractor personnel will continue to expend considerable time arguing the point in and out of court. Separable elements type language was recognized in ASPR case No. 72-65, the interim DFARS of 9/10/85, the 1985 Bell Helicopter-Textron case (at p. 92,394) and more recently by the U.S. Court of Appeals (D.C. Circuit) in Conax Florida Corp. v. U.S., 824 F.2d 1124, 1130 (July 24, 1987).

If the absence of separable element language means that the DAR Council rejects the idea of separable elements, they should clearly say so in the definition. Building in a point of contention makes little sense.

227.471

"Government purpose license rights" -

The right to use GPLR data is a right granted to the Government and should be so limited.

If in the process of selecting a licensee, the Government discloses the sensitive technical data to more than one licensee, as a practical matter, the technical data cannot be effectively protected. Once the technical data is generally available in the military market, trade secret protection (as a practical matter) will be lost and the trade secrets will be used for commercial purposes as well as Government purposes. These markets overlap too much for a mere Government prohibition to stop use in commercial applications; unless, a new criminal statute was enacted to prevent misuse of GPLR data.

The exact purposes, restriction, etc. for which GPLR technical data may be used will be identified by the terms of the license. The definition should recognize this.

"To do so" is too broadly stated, a licensee is authorized to use the technical data as specified in the license.

227.471

"Limited Rights" -

First paragraph - Adding section numbers to the 3 areas of limited rights was always included in prior ASPR, DAR and DFARS Clauses. It helps to illuminate the definition. We suggest it be put back in.

Subsection (a) - This added language was always in prior Data Rights Clauses. It is extremely important that the Government first check availability of the item before it provides any third party with access to detailed drawings of the originator. Not only is it cost effective to do so, but its more protective of the developer's property rights.

In order to assure subsequent trade secret protection, it is necessary that written proof, including a copy of the nondisclosure agreement, be available to support litigation, if needed. Notification by the Contracting Officer should be prompt and written.

Subsection (b) - Foreign governments shouldn't obtain our proprietary detail design technology, especially as defined in your proposed definition, thereby enhancing our flow of technology overseas and exacerbating the U.S. balance of payments.

227.471

**"Required as an Element of Performance Under a
Government Contract or Subcontract" -**

The stricken language should be deleted for the reasons described under the proposed definition "Developed Exclusively at Private Expense" above. The stricken language also causes the defined phrase to take on a meaning beyond that of the defined phrase.

227.471

"Restricted Rights" -

Nonstandard restricted rights legends resulting from specific contracts should be noted with a "Nonstandard Rights" legend. The terms of the contract or subcontract would establish the legend or a reference to the contract or subcontract should be included in the legend.

How could anyone keep track of all the various definitions that would be created? The concept of what "restricted rights" and "unlimited rights" means, by definition, should be fixed. Leaving it open to change on a contract-by-contract basis could be very dangerous for both the Government and the contractor/subcontractor. Further, contractors who accept a non-standard

definition in the prime contract would be forced to flow it down to subs (per Clause 252.227-7013) without alternation, thereby forcing subs to accept an unfair, non-uniform and unintended definition.

227.471

"Unlimited rights" -

Even if the Government has funded 100% of the development, Government should not be permitted to release data for "commercial" purposes, even if in GPLR negotiations the Government obtains unlimited rights at some future time. While there may be an immediate Government benefit in doing so, whatever commercial value remains in the rights should be preserved for the developer.

This position was recently supported by the federal District Court (of Washington, D.C.) in the case entitled Pacific Sky Supply, Inc. v. Dept. of the Air Force, No. 86-2044 (Nov. 20, 1987), when they refused to disclose unlimited rights data to commercial competitors of the data developer, saying:

"Even if the Air Force obtained unlimited rights in these drawings, Pesco, and then Sunstrand, were not divested of their rights in the drawings. The undisputed facts show that Sunstrand continues to profit from these drawings on a commercial basis." Page 6.

This definition also encourages offshore access to our best technology.

227.472-1 -

"Unpublished" -

There is no reason to place unlimited rights technical data in the public domain.

227.472-1 (a) -

Technical data has the indicated uses but are not always "required". Technical data generated during research and development is not always disseminated; therefore, "are often" should replace "must be". The Government is not invariably required to make technical data available for competition although it frequently does; therefore, the word "must" isn't appropriate. "Finally" implies that of the Government's Interests discussed in this provision, the least important one is encouraging innovation and new data development at private expense.

A part of a contractor's or subcontractor's decision to invest private funds to improve an existing technology or develop a new one is whether he can protect his investment until he obtains a fair return on it.

What is a "fair return" probably includes enough money to help finance an entire new development program. For instance, John W. Lyons, Director of the National Engineering Laboratory (Nat. Bureau of Standards, Washington, D.C.) was recently quoted in Mechanical

Engineering (April 1988), page 38, that only about one in a hundred new ventures ends up making a profit. Penalizing the one profitable development will soon close down the entire innovative development program at most companies.

These regulations must be sufficiently certain for him to make his investment in new developments with a high degree of confidence. Otherwise he may decline to make the investment or exercise any number of other choices. Leaving the decision to the Government of whether or not to permit the private investor to exclusively exploit his innovation is not much encouragement.

227.472-1(b)

Reference should consistently be made to "contractors and subcontractors" rather than the limited group of "commercial and non-profit organizations". There is a

huge group of military program subcontractors who develop components at their private expense who likewise deserve protection of their property interests in secret technology. Even the FOIA's (b)(4) trade secret exemption recognizes that unless the Government exercises discretion in obtaining and disclosing contractor trade secrets it's future access to this information may be impaired. Considerable technical data has been obtained over the years for emergency repairs, training, provisioning, etc. Using this technical data for competitive reprocurement is inconsistent with the DoD's representations (and justification) given for obtaining it initially, and does in fact, jeopardize their competitive advantage in all situations.

The massive numbers of unjustified blind challenges of proprietary legends of recent years (for the purpose of competitive acquisition) has alerted industry to the new DoD intent to use the data for competitive procurement. Competitive procurement is patently inconsistent with the contractor's or subcontractor's interest. The Government will increasingly find it more difficult to obtain delivery of data (for repair, maintenance, etc.) irrespective of the justification given.

It's also a fact that military contractors also closely guard their proprietary data. They must not be excluded when the balancing of interests are discussed in policy sections. The hardship caused is not limited to "economic". Innovative vendors have a lot of pride in their discoveries and suffer mental trauma when their secrets are wrongfully dumped into the public domain.

227.472-1 (c)(1) -

As written, this subsection balances various competing Government interests. Contractor and subcontractor rights should be scrupulously protected to encourage private expense development. The Government needs to encourage delivery of technical data to satisfy Government needs. Fostering long-term technological progress is satisfying a primary Government obligation. Providing for short-term price competition is satisfying a more temporary Government objective. The Government should control the data it acquires consistent with its ability to handle it.

Since, the interests being balanced in this section are predominantly Government interests, the title to the section should reflect this.

"Subcontractor's" make substantial private investments to develop new systems and component technology for military weapons. Government-funded R&D dollars seldom get flowed down by the prime contractor, even through subcontractor content on many weapons (aircraft, etc.) exceed 50% regularly. Their interests must be recognized and balanced if the Government is to keep its industrial base of high quality subcontractors from shrinking.

227.472-1 (c) (2) -

Government does not always have an obligation to foster technological progress. The primary purpose for providing for competition is to serve Government short-term budgetary interests (complying with Gramm-Rudman, CICA and obtaining the lowest price). Providing competitive opportunities is a secondary interest. Thus, the sentence should be altered as suggested.

Further, procurement "fairness" is one of the four basic principles highlighted by the legislative history of the CICA. That principle should be reflected in the balancing of interests policy section.

The added sentences is necessary to make clear to the Contracting Officer that he/she must consider a likely

result of overly aggressive efforts to obtain technical data. (See para (a) comments above).

227.472-2 -

As written, the first factor assumes that the minimum Government needs have already been established. If it has already been decided that the item "will be competitively acquired", there is no reason to establish "minimum Government needs". As rewritten, the consideration allows the Contracting Officer to measure acquisition planning objectives against each item, component or process.

The second factor doesn't seem to be relevant. The same or nearly the same amount of technical data will be required irrespective of whether the Government does the repair and overhaul or it is contracted out.

The third factor should seek to "maximize" procurement of non-developmental commercial items per new DFARS 10.001 and 10.002 (see our initial comments to 227.471 above).

Again as written, the fourth factor assumes that the minimum Government needs have already been established.

In establishing Government needs whether the item, component or process "can" be acquired (the feasibility) by these other methods is a relevant inquiry to defining the Government's needs.

The purposes for which disclosure of detailed design data is needed will have a significant impact on the ability of the Government to obtain future access to the detailed technical data. If the Government need is for reprocurement, access to detailed design data will be much more difficult and expensive than for other purposes e.g. provisioning, etc.

If access to detailed technical data is sought for reprocurement early in a program's life before significant return (or recapture of) the contractor or subcontractor's investment, the cost of the technical data will be higher than if access is sought later.

This will impact the Government's needs; therefore, "when" should be added to the provision.

As explained in Comments at 227.471-1, contractor's "and subcontractor's" both have interests in addition to economic interests. Further, DFARS Subpart 217.72

(section 17.7201-2(b)) uses the word "shall" use procedures in order of the least intrusive first, and requires a demonstration of "significant cost savings" for the most intrusive method (ie., reverse engineering).

227.472-3 and (a)(1) -

The Government obtains rights in technical data "delivered" under contract or subcontract as a line item deliverable, not because the technical merely satisfies one of the descriptions of unlimited rights technical data. This is an extremely important constitutional (5th Amendment just compensation) requirement.

227.472-3(a)(1)(ii) -

The suggested language is necessary to recognize separable elements. (See 227.471 "Developed Exclusively at Private Expense" page 6 above.)

227.472-3(a)(1)(viii) -

Although on expiration of GPLR it may be negotiated that such technical data may become GPLR, it should not be dictated by regulation.

227.472-3(a)(1)(ix) -

This provision is a dangerous expansion of data policy and could easily produce a forfeiture for lower-tier

subcontractor's rights by a higher-tier contractor by inadvertence (ie. failure to get the supplier's proprietary data in the prime contract list). If a subcontractor's claimed (or asserted) limited rights or Government purpose license rights restriction was not on the list, this provision converts such technical data to unlimited rights. The civil liability exposure of the prime or higher-tier contractor is substantial. (Also see our Comments at 252.227-7038). The grossly negligent Government employee may also be exposed to criminal liability under the Trade Secrets Act (18 U.S.C., Sec. 1905).

This provision also subverts 2207.473-3(c)

A lower-tier subcontractor is well advised to not deliver detailed technical data, prior to an express, written agreement by the Government clearly delienating his rights in the prime contract (piercing the wall of contract privity, etc.).

227.472-3(a)(2)(i) -

The suggested language is necessary to clarify the provision.

More often than not military programs are not funded so that a good estimate of the number of units to be manufactured by certain date can be accurately predicted. Return on investment is nearly always predicated on the number of units produced. Therefore, the additional language is necessary to permit an adequate return based upon a break even number of units (or shipsets) manufactured.

In subparagraphs (i) and (ii) by use of the phrase "be entitled to", the implication is created that the Government has a right to unlimited rights apart from these regulations. It does not. The Government obtains unlimited rights solely because the owner accepted these regulations as part of his contract or subcontract. The Government's obtaining unlimited rights under (a)(1) are part of the rights that the owner "negotiates" away, and for which the owner is entitled to monetary consideration.

227.472-3(a)(2)(i) -

By definition GPLR technical data involved some contractor/subcontractor funding, why should this developer lose all rights simply because there was also some Government funding. The Government's interest in denominating technical data as unlimited rights is

insufficient to overcome the developer's interest in the data. Why does the Government ever need unlimited rights.

227.472-3(a)(2)(ii) -

Because these regulations label certain technical data as subject to unlimited rights (See (a)(1)(iii),(iv),(vi), etc.), this does not mean that the owner has no remaining vested right or property interest in the technical data, especially in the commercial market (see our discussion of the Pacific Sky case under 227.471, "Unlimited Rights", above). Where an owner insists on recognition of his rights or interests in unlimited rights technical data, the Contracting Officer should not be precluded from negotiating with him.

227.472-3(b)(1) -

This language will completely undercut the very sanctity of contract law - ie., that the parties to a contract can agree (in the Contract Schedule) to what is, and what isn't limited rights data. This very "right to contract" is protected by Public Laws 98-525 and 99-500, (Section 953). Those laws, in reference to tech data regulations to be subsequently promulgated pursuant to

those statutes (which are essentially these regulations), the Congress said, in pertinent part:

"Such regulations may not impair any right of... any contractor or subcontractor with respect to patents, or copyrights or any other right in technical data otherwise established by law."
(emphasis added) 10 U.S.C., Sec. 2320 (a)(1).

Further, prior data rights clauses (ASPR 9-202.3, DAR 7-104.9(a), and DFARS 52.227-7013) over the past 30 years, through the effective date of these regulations (April 4, 1988), have all provided for a contractual agreement on limited data rights as a completely independent basis for proprietary protection.

More importantly, the contractors and subcontractors who deal with the Government will simply not have any finality (or certainty) of contract whatsoever, especially since technical data regulations (including definitions of "developed entirely at private expense") are changing virtually every year.

The proposed language will ensure that all data delivered to the Government will be challenged causing the administrative cost of contracting to substantially increase, as well as perpetuating the current adversarial relationship between contractors and the Government.

The written negotiated contract Schedule agreement must take priority over any policy or regulation, including the paragraph (a) wish list of unlimited rights. We urge the DAR Council to reconsider this language.

The Government only obtains rights in technical data which are "delivered" under contract or subcontract, not because the technical data meets the description of limited rights technical data. This is a legal distinction which must be made explicit in the regulations.

227.472-3(b)(2)(i) -

The parenthetical reference is added as necessary to identify the source of and procedures to substantiate the Government's "needs".

It should be made clear that the Government must negotiate with the party "asserting" the rights. Otherwise, Government may interpret the phrase to mean that the Government may negotiate with a higher-tier contractor regarding rights of a lower-tier contractor whose item, component or process is incorporated in the higher-tier contractor's item, component or process. This would not only be arguably illegal and unfair, it would arguably be a "relinquishment" of the lower-tier contractor's

rights prohibited by 10 U.S.C. 2320(a)(2)(F). Because, after the Government and higher-tier contractor have negotiated all rights to the item, component or process of which the lower-tier contractor's item, component or process is a part, the lower-tier contractor's choice would be limited to sell/relinquish or be disqualified from bidding. The higher-tier contractor would thus have violated the statutory provision.

It is clear from recent Public Laws 98-525, 99-661 and 100-180 and these regulations (227.472-1(a)) that it is the policy of Government to encourage private expense development. Such policy is meaningless unless it is incorporated into the sinew of these regulations.

It is also clear that the Government should pay only a fair price (ie., just compensation) for the value it receives, and that the item, component or process must satisfy the schedule.

These regulations establish very complex rights and procedures affording little ability for the typical subcontractor to receive the true value of his item, component or process, or have the merits of his compensation claim heard first hand by the decision

maker. The bottom line to these regulations is that the Government can obtain access to the technical data, unless the owner refuses the contract. There is a forced-negotiation aspect written into these regulations. This will result in less private expense development (and other results discussed elsewhere herein). Negotiation is a "mutual" procedure and, by its very definition (in Webster's) implies that either party can refuse to agree at some point in the talks or refuse to negotiate at all.

However, the Government need not really start negotiation to acquire limited rights technical data. unless it has reason to believe it won't realize fair prices or can't get timely delivery. The suggested language provides for these real problems.

Proprietary rights in technical data have value apart from an individual contract. The Government, as a matter of equity, should evaluate the price of procurement rights in proprietary technical data as part of a bid price on a contract. While the cost to the Government of such rights may be evaluated, the evaluation should be separate from the evaluation of the cost and performance of an item, component or process.

The words "before acquiring..." in section (b)(2)(i) suggests that the Contracting Officer has an absolute right to acquire greater rights in this "limited rights" technical data. He does not. He may evaluate the owner out of the competition.

The Contracting Officer does not have the wherewithall to develop alternate items, components or processes. He

can develop "requirements" as the alternate language suggests.

Subpart (B), as written, encourages the Contracting Officer or higher-tier contractor to coerce the data owner to develop a second source without any consideration of "net savings" to the Government, return on the developer's investment, continued availability of multiple suppliers, size of the market to support more suppliers, impact on future investment in innovation, etc. As suggested, the Contracting Officer should search for commercial substitutes.

227.472-3(b)(2)(i)(C) -

Direct licensing is encouraged by P.L. 100-180 and these regulations encourage use of the least intrusive means of satisfying Government need. Encouraging direct licensing would satisfy these requirements.

227.472-3(b)(2)(ii) -

As written, this provision suggests that the Contracting Officer has an absolute right to obtain greater rights. The contracting officer may not insist on obtaining greater rights nor may the contractor/subcontractor be disqualified or excluded from contracting for refusing

to sell or relinquish its data developed entirely at its private expense (See 10 U.S.C. 2320(a)(2)(F)). The suggested language clarifies this.

227.472-3 (c) -

The complete statutory and regulatory reference is more useful. "Associated with" is too broad a reference. As such the negotiations could cause negotiation of items not "pertaining to" the item, component or process.

An item, component or process may contain items, components or processes that were themselves developed exclusively at private expense or with mixed funds by the prime contractor or another contractor. The additional language makes it clear that the rights in these items must also be negotiated.

It is one matter for the Government to satisfy its statutory obligation to negotiate if the contractor does not provide notice. For the Government to forfeit mixed funding rights of the contractor or more seriously mixed funding or exclusively at private expense rights of a subcontractor for failure of the prime contractor to provide notice is legally suspect.

The prime contractor's liability exposure would be significant and unfair.

227.473-1 (a)(1) -

Since 252.227-7013 is so extensive, a specific reference to paragraph (J) would be very helpful.

In paragraphs (a)(1) and (a)(2) "to the extent feasible" should be inserted as indicated because the offeror at the proposal stage simply does not have all of this information. Paragraph (a)(3), below, implicitly recognizes this. Inserting the phrase simply clarifies the language.

Providing this information will require incurring additional costs, and on some solicitations, longer solicitation periods. We assume the DAR Council has made an appropriate cost benefit analysis and has concluded that obtaining the information is worth the effort.

227.473-1 (a)(2) -

10 U.S.C. 2320(a)(2)(B), regarding data developed exclusively at private expense, grants the developing contractor or subcontractor a right to deliver the

technical data to be delivered with restrictions on use and disclosure.

The reasons for the changes to the last sentence are explained below regarding paragraph (a)(4), 252.227-7028 and 252.227-7038.

227.473-1 (a)(3) -

Since 252.227-7013 is so extensive, a specific reference to paragraph (J) would be very helpful.

For higher-tier contractors this provision will build-in programs delays and probably increase changes claims. It also encourages higher-tier contractors to exclude items, components and processes developed at private expense. This language encourages higher-tier contractors to violate 10 U.S.C. 2320(a)(2)(F) which increases the probability of litigation. On February 4, 1988 Eleanor Spector confirmed, in a public speech at a PIA Symposium in Washington, D.C. that this prohibition on exclusion of proprietary subcontractors did, in fact, apply to prime contractors. The language is changed to diffuse this potentially destructive temptation.

227.473-1 (a)(4) -

10 U.S.C. 2320(b)(5) requires "identifying" technical data to be delivered to the Government; it does not require "certification". As the clause at 252.227-7028 indicates, "the same or substantially the same technical data" previously delivery must be identified. As indicated, a substantial degree of judgment is involved in determining what is the same or substantially the same. Therefore, requiring "certification" is inappropriate. "Notification" is appropriate.

Technical data currently in the Government's possession and containing a proper limited rights legend under previous regulation did not contain an expiration date. Technical data negotiated under these regulations may not have an expiration date; therefore, "if any" should be inserted in subsection (i)(B).

In subsection (iv), "parties" means parties to the Government contract. The Government and the prime contractor do not have the right to negotiate away the property rights of subcontractors. The recommended language clarifies this.

See our comments at Clause 252.227-7038 with regard to subparagraph (ii) recommended change.

227.473-1 (b) -

Unless a "reasonable time" is suggested in (i), the Contracting Officer could imply that per (iii) in most cases the Government's interests and his own workload could best be served by resort to paragraph (d) below regarding impracticable negotiation situations.

The "parties" to a prime contract are the Government and prime contractor. On programs where subcontractors claim restrictive rights (nearly all), this provision directs the Contracting Officer to negotiate with the prime contractor regarding the subcontractor's rights. This is inconsistent with established law and the U.S. Constitution.

It also encourages higher-tier contractors to violate 10 U.S.C. 2320(a)(2)(F) because, if the prime contractor and Government have negotiated the subcontractor's rights, the prime contractor would be forced to exclude a subcontractor unwilling to accept the results of that negotiation or breach the agreement made with Government. The suggested language makes it clear that the negotiation must be with the party asserting the right.

As written, (ii) assumes that negotiations are required. Per the inserted language, they are not.

227.473-1 (b)(2)(i) -

The Contracting Officer should be provided a negotiation objective so that the factors can be reasonably applied.

As discussed in comments to (b)(1) above, it should be clear that the negotiations must occur with the party asserting the rights.

The deleted language represents a major concern for subcontractors in these regulations. By including negotiation factors for mixed funding, Government funded items which the owner desires to commercialize and items developed exclusively at private expense in one listing the Contracting Officer is being misled to believe that these different types of items should be negotiated the same. If this is so, why should private expense developers use their own funds to develop items for Government uses or offer their commercial item to the Government.

To insure that Contracting Officers are not misled, we strongly suggest that negotiation factors for items, components or processes be separated stated as in suggested sub-sections (b)(2)(i) and (ii) below. Subsequent comments on this section (b)(2)(i) will assume that they only apply to mixed funding (ie., when the Government negotiates to relinquish its rights).

Factors (A) and (B) - Deletion of "or system" ensures that the negotiations occurs with the party asserting the rights.

Factor (D) - The Government is not in a position to know whether or not the technology can be commercialized. The contractor's or subcontractors intent to try to commercialize the technology is all that should be required.

Factor (F) - As stated, this starts with an assumption that there exists a mobilization need.

Factor (G) - This implies that the Government does not intend to protect subcontractor's technical data. The added language is necessary to clarify the limited nature of the Government's burden.

Factor (H) - This added item is required by the Congress per 10 U.S.C. 2320 (a)(2)(E)(iii).

227.473-1 (b)(2)(ii) -

By virtue of Government funding some or all of the development, it may be reasonable to consider the tangential pro-Government factors in (b)(2)(i) above. However, when the item, component or process was developed exclusively at private expense, the negotiation should be limited to these 3 factors. The Government-funded data of (b)(2)(i) factors are so biased

toward "obtaining the technical data" that they virtually contradict the earlier DoD policy statement at 227.472-1(c)(1), and the Congressional prohibition of 10 U.S.C. 2320(a)(2)(B) and (F).

Before investing private funds in the development of items, components and processes private expense developers need to be able to predict the likelihood of recovering their investment. The pro-Government factors of (b)(2)(i) preclude any such prediction.

There also is a need for the DoD to document its data needs and cost/performance comparison in writing before negotiations are attempted. Many attempts at data acquisition are totally unnecessary because the proprietary vendor still has the best price and delivery terms, or its one-time purchase with no need for data, etc.

The ASPR, DAR and DFARS have always had this safeguard in them before.

227.473-1 (b)(2)(iii). - ~~to be~~ ~~obtaining of~~ ~~data~~
Change (ii) to (iii) to accommodate new provision (ii).

The examples encourage Contracting Officers to ignore differences in ownership resulting from the "source" of funding. (See comments to (i) and (ii) above.) In subparagraphs (A), (B) and (C) below, the identifications have been added.

As discussed at (i)(D), the contractor's or subcontractor's intent to commercialize is most appropriate. Since the examples provided in this section do not include an example of an item, component or process developed exclusively at private expense, we have provided such an example as (D).

227.473-1 (b)(2)(ii)(E) --

The development process is usually a multiple step process; first a conceptual design is produced, then a proof of concept model is made, then full development occurs. When the contractor or subcontractor funds the first step, and a proposed contract further explores the conceptual design without development of, or delivery of, items or components, the privately funded design should be protected. Only after the Government funds the first hardware phase development should the contractor's rights be degraded.

227.473-1 (b)(2)(iv) -

Change (iii) to (iv) to accommodate new provision (ii).

It is inappropriate to impose time limits on items components or processes developed exclusively at private expense. 10 U.S.C. 2320(c) permits the negotiation of time limits. However, 10 U.S.C. 2320(a)(1) states:

"Such regulations may not impair any right of...any contractor or subcontractor with respect to...any other right in technical data otherwise established by law."

Items, components and processes developed exclusively at private expense are recognized in common (state) law as trade secrets. Such trade secrets are established by law without time limitations. To coerce negotiation of time limits is inconsistent with the legislative intent of Pub. L. 99-500 and the above-quoted statutory language in 10 U.S.C. 2320(a)(1).

Government estimates of production delivery schedules are routinely revised due to funding limitations and other reasons. Requiring that the time period be based on time periods alone is unfair and will impede the negotiation. Contractors and subcontractors normally compute the recovery of the return on their investment (ROI) on number of units.

Note: Subsequent comments on this provision are made based on the assumption that limited rights technical data have been removed from this section. If that is not so, significant revision to these factors would be appropriate.

(A)(3) - Will the Government publish or encourage a third party to publish the economic life of various technologies; otherwise, widely disparate views can be expected.

(A)(5) - The technical data expected to receive wide distribution (technical manuals, form, fit function data) is to be delivered with unlimited rights. The burden on the Government is considerably less than on the contractor/subcontractor to protect his rights.

(A)(6) - Developer's intent to commercialize is more relevant.

(B) - As noted in (b)(2)(iv) placing time limits on items, components or process developed exclusively at private expense is entirely inappropriate and violates federal law (above). Further, its investment amount may cover other unsuccessful development activities in the

form of burden rate (see our comments to 227.472-1(a) above.

This provision is written so that recovery of the contractor's or subcontractor's ROI is a special case which denigrates its significance. If the Government is committed to the contractor or subcontractor recovering his investment, this poor cousin should be included in the factors of (A). The condition ("If") destroy the Government's grudging commitment to its supplier's recovery of investment.

(C) As noted in (b)(2)(iv) - Requiring time limits on limited rights technical data is inappropriate and illegal (above). The given conditions for extending time limitations are so insignificant as to destroy the idea.

As to time limits generally, their negotiations will prove to be very time consuming, especially the time lengths suggested herein, which are much shorter than the 7 year negotiation objective suggested at 10 U.S.C. 2320(c).

227.473-1 (b) (2) (v) -

Change (iv) to (v) to accommodate the addition of (ii) above.

As noted in (b) (2) (iv) placing time limits on limited rights technical data is inappropriate and illegal (above).

In view of the complexity of these provisions and the risks taken by contractors and subcontractors in accepting them, this provision does not permit local Government activities to obtain access to data to satisfy specific local needs. The suggested language provides an accommodation to satisfy immediate local needs. PIA has found that much of the technical data in the Government's possession currently being challenged (especially that of subcontractors) was obtained to satisfy an immediate local need. It was not contractually delivered as a CDRL requirement, but was, simply supplied at no cost by a contractor or subcontractor because someone in the Government needed it.

227.473-1 (c) (1) (i) and (ii) -

This new requirement can create an administrative nightmare regarding getting subcontractor's proprietary

technical data added to the prime contract list. It exposes a prime contractor to civil liability if they agree to limited rights status in its subcontract but do not get it into his prime contract list. Subcontractors just won't sign up on a subcontract unless they see the Contracting Officer's signature on it agreeing to their proprietary data rights. Therefore, we've suggested language allowing the Contracting Officer to do so. We've also suggested a new subsection (iv) as remedy (see our below comments).

227.473-1 (c)(1)(ii)

On any significant size contract, modifications to the contract are highly probable. This likelihood should be communicated to the Contracting Officer. If the Government wants periodic updates to the list, this should also be communicated by making modifications plural. The word "bilateral" is unnecessary; its use may alter the changes clause in an unknown manner. The normal changes rules should continue to apply.

227.473-1 (c)(1)(iii)

The word "must" is unnecessary.

227.473-1 (c)(1)(iii) -

If under subsequent Section (d) all of the rights have not been negotiated, the party asserting restrictive rights must be permitted to deliver the data with the legend claim or run the risk of losing his claimed rights.

227.473-1 (c)(1)(iv)(added) -

As we perceive it, the prime contract list is the primary source of information regarding rights in technical data on the overall system for the life of the system. It will provide a ready source of this information to users, logistics, procurement, etc. for many years. Dire consequences befall any supplier whose proprietary technical data is not listed. These regulations have made the prime contract list a center-piece, and yet there is no mechanism for a lower-tier subcontractor to ensure that he is on the prime contract list or get on this list if he should be on it and was left off. In an extreme circumstance the Contracting Officer or prime contractor could wrongfully refuse to include a subcontractor and that subcontractor would have no recourse but withhold delivery of his technical data and suffer the penalty. The suggested provision in (c)(1)(i) and (ii), above are intended to cure this deficiency;

however, this new subsection (iv) provides an alternative correction which could solve this problem.

227.473-1 (c)(2) -

As written, use of the standard non-disclosure agreement is limited to GPLR data, leaving all other restrictive uses protected by a regulatory "prohibition against further release", without a Standard Non-Disclosure Agreement. The prohibition isn't strong enough, unless backed up by a new criminal statute (with real teeth in it) designed to protect proprietary data (like the Trade Secrets Act, 18 U.S.C. 1905). Indicated changes expand the use of this Standard Non-disclosure Agreement to other applications.

Reference to "contractor" have been changed to "recipient" because a recipient may not yet be a contractor.

In (ii) "developer of the data" has been changed to "party asserting the rights" to be consistent with other suggestions made elsewhere in our comments.

In (iii), each release requires a new agreement because the data identified and purpose of the release will vary with each release.

Standard Non-Disclosure Agreement

Throughout the agreement "licensee" should be changed to "recipient" because the party to whom the data is disclosed may not as yet be a licensee.

In paragraph (1) of the agreement it is necessary to limit use of the data to "specified Government purpose", and add blank lines so that purpose can be filled in on a case-by-case basis because the agreement should be specific.

In paragraph (2) of the agreement, it is necessary for the Government to receive a copy of the agreement for its files. The Government does not avoid liability for failure to obtain an agreement, thus, the Government should maintain a copy. (See paragraph 7 of the agreement).

In paragraph (3), it is necessary to limit the purposes that a subcontractor or potential subcontractor can use the data to those specified in the contractor/Government agreement.

In paragraph (4), the word "any" should be added to indicate a broad scope to "commercial purposes".

In paragraph (7), the Government derives a benefit from execution of this agreement because the Government is contractually obligated to do so. Language equating to a "confession of judgment" has been added for an injunction to prevent wrongful disclosures of its data. This is an effective policy mechanism which keeps the Government out of the enforcement loop.

227.473-1 (d)(1) -

As previously noted above, the prime contractor has no right to negotiate rights of his subcontractors. It also violates the "prohibition" in section 227.473-2 (below) and federal law (10 USC, Sec. 2030(a)(2)(B) and (F)). Negotiation is not mandatory, only permissive under 10 U.S.C., Sec. 2030(a)(2)(G). This new regulation was not contemplated by the Congress, especially in light of the Pub. L. 99-500 legislation history condemning "coercion" of legitimate rights in proprietary technical data.

PIA is aware that the October 1986 legislative history to Pub. L. 99-500, Section 953 (ie. Conference Summary)

provided certain interpretive guidelines to the DAR Council for implementing these technical data regulations. The last such guideline referred to use of an evaluative factor relating to "ability to compete the item in future acquisitions" due to inability to negotiate (1) acquisition of data rights, or (2) developer's commitment to develop an alternative source for the item in question.

PIA would ordinarily suggest that some reference should be made to use of an evaluative factor in subsection (d) of the regulations if negotiation is impracticable, however, successive iterations of these regulations have ignored these same legislative history guidelines on other points (ie., definitions of "private expense", etc.), and therefore, PIA can't endorse a piece-meal adoption of that history of only its pro-Government terminology.

227.473-1 (d) (3) (new) -

The Contracting Officer should be given guidance regarding failure to reach agreement so that neither he nor the prime contractor unknowingly violates the 10 U.S.C. 2320(a)(2)(F) statutory prohibition.

227.473-1 (d) (4) (new) -

See our comments at 227-473-1(c)(1)(iv) (added).

227.473-1 (e) -

Unless authorized by law, flowdown is inappropriate.

227.473-2 - Prohibitions

General. In view of the anomosity created by the data rights regulations over the past few years, their complexity and frequent change, PIA suggests that they be located right up front in the regs at 227.472-2 regarding "Policy" for acquiring data and rights in data.

227.473-2 (a) -

The paraphrased portion of 10 U.S.C. 2320(a)(i) was omitted from this prohibitions section.

227.473-2 (b) (1) -

The exceptions language (b)(1)(ii) must also include the "subcontractor" by statute. Adding the other statutory language also helps clarify the reg.

227.473-2 (b) (2) -

If this provision is meant to provide guidance to the Contracting Officer, it would be much more beneficial

if complete guidance were included to suggest what he or she should compare life cycle cost to the Government against. In the absence of such specific comprehensive guidance, no guidance is better.

Our comments to 227.473-1(d)1 apply also. The mandatory statutory prohibition language in 10 U.S.C. Sec. 2030 (a)(2)(B) and (F) is "unambiguous" and quite literally in conflict with this piece of legislative history, upon which the suggested regulation is based.

The statute simply prohibits any coercive solicitation or evaluation of data developed at private expense as a condition of contracting or award of a Government contract. It was intended to prevent the exclusion of proprietary vendors from Government programs, which was occurring in the 1984-1986 time period when Public Law 98-525 was in effect (which only suggested that this be done as a policy matter).

We encourage reference to our PIA paper entitled: "Exclusion From Government Contracting (For Refusal to Grant Unlimited Rights in Technical Data) January 1987, submitted as Appendix C to our DAR Case 84-187 Comments 2/16/87. At pages 31 through 49 we explain certain

fundamental concepts (and case law) of statutory interpretation, all of which point to the conclusion that a court of law would strike down the regulations evaluative factor as another DoD attempt to perpetuate its 1984-86 exclusion policies.

227.473-2 (c) -

The reference provides for obtaining greater rights in technical data. Since this section deals with statutory prohibitions, the reference should be to the statutory source of the prohibition, not an intermediate regulatory reference.

On February 4, 1988 Eleanor Spector stated in a public speech at PIA's Symposium in Washington, D.C. that the statutory non-exclusion prohibition applied likewise to prime contractors. Rick Summerour, Chairman of the Subcommittee on Technical Data, agreed. It is appropriate, therefore, to put it in the regulations.

227.473-3(c)-

This savings clause re. correction of data markings must apply to contractors and subcontractors to be effective.

227.473-3 (e) -

"Proper" permits the Contracting Officer to unilaterally determine the proper marking and so use the technical data. An incorrect determination of the "proper" restriction may expose the Contracting Officer to personal criminal liability under 18 U.S.C. 1905. Even after notice, the Government's actions are dependent on their correct evaluation of the marking.

227.473-4 - Validation of Restrictive Markings, etc.

In our 2/16/87 response to DAR Case 84-187 PIA provided a Comments paper entitled "Validation, An Interim Analysis" - January 1987 as Appendix D. We encourage reference to that paper on this part of the proposed regulation.

227.473-4(a) -

Subcontractors regularly deliver their technical data to higher-tier contractors many years before the prime contractor delivers the total system's technical data to the Government. The Government or prime contractor could review the appropriateness of any restrictive legend within three years after the subcontractor delivered the data or final payment is made. This would aid the Government's or prime contractor's review

efforts by spreading out the review time period. It would also avoid imposing an unreasonable record maintenance burden on lower-tier subcontractors.

FAR 4.7 establishes a general three year record maintenance requirement on contractors and subcontractors. As drafted, the regulation could in many cases require lower-tier subcontractors to maintain some records for considerably longer than 3 years.

In Conax Florida Corp. v. U.S. 824 F.2d 1124 (D.C. 1987), at page 1131, the Federal Circuit Court suggested a reasonable time for the Government to challenge the propriety of the records. It would be unreasonable to insist on retention of the records for more than three years by subcontractors.

Although not directly required by law, DoD should abide by all of its decisions and obligations out of consistency, fairness and basic contract law principles. For instance, recently one Navy agency stated that it

"suspended" its 1984 challenge for the economic benefit of both parties after, the subcontractor presented evidence and case law to show conclusively that it was authorized to mark its data with Limited Rights legends.

We, therefore, suggest that these last two sentences be eliminated so as not to suggest practices to field personnel that could also become abusive.

Some agencies are taking two to three years to decide formal challenges. These challenges were made under DAR 7-104.9. If the last two sentences are to be retained, the first sentence should be amended to read,

"The Contracting Officer's final decision resolving a formal challenge constitutes Validation as addressed in 10 U.S.C. 2321, as does a failure to make a decision within one year after the contractor or subcontractor has responded to the challenge."

227.473-4(b)(1) -

Both Public Laws 98-525 (1984) 99-500, Sec. 953 (1986) and 100-26 concerned validation of proprietary data restrictions and specified the procedures, and contractor/subcontractor safeguards, for doing so in title 10 of U.S.C., Section 2321. Initial subsection (a) of both earlier laws contained an initial record keeping requirement that:

"A contractor or subcontractor at any tier shall be prepared to furnish to the Contracting Officer a written justification for any restriction asserted...on the right of the United States to use such technical data." (emphasis added)

P.L. 100-26 restated this provision. The only requirement to actually furnish records is subsection (b) after a formal validation challenge.

As such the Government is free to request a voluntary pre-challenge response by the contractor or subcontractor to disgorge this information; however, since it is very costly in time and labor to collect information and prepare voluminous documents to meet typical voluntary requests, and the contract or subcontract (which is usually fixed price) rarely has any administrative cost bid into it to cover these requests, the supplier will rarely respond to these requests.

Refusal, or failure, to respond to such a prechallenge request is simply an economic decision of the supplier and is not required by these statutes.

If the Government receives no information from the supplier then this is not a legal basis to bootstrap "reasonable grounds" (see our below discussion) in order to institute a formal validation challenge. To do so on a regular basis would be an abuse of this statutory (and constitutional) due process protection.

Therefore, the regulation should say the C.O. "may" make these requests, but if refused he/or she must look elsewhere to establish a basis to challenge.

If the contractor or subcontractor voluntarily furnishes information, additional justification requests should specifically identify the additional information sought. Otherwise, the subsequent submittal may also be incomplete!

Requesting on-site visits or inspections could give the Government access to records that the contractor or subcontractor could not or would not be willing to provide in written form. Government questions could be answered on the spot and the review would be much more efficient than providing written justification which places nearly the entire administrative burden (ie. time and cost) on the owner of the technical data.

227.473-4(b)(3) -

The "reasonable grounds" definition must also be referred to here and in clause 252.227-7037, where appropriate, so that the challenging Contracting Officer knows what standard or burden is placed upon the Government. For instance, the legislative history of P.L. 98-577

said reasonable grounds must be "more than a mere suspicion", and in the nature of "probable cause", etc.

Public Law 100-26 (Codified at 10 U.S.C., Sec.

2321(d)(1)) states:

(d) Challenges to restrictions.-

(1) The Secretary of Defense may challenge a use or release restriction asserted with respect to technical data by a contractor or subcontractor at any tier under a contract subject to this section if the Secretary finds that -

(A) reasonable grounds exist to question the current validity of the asserted restriction; and

(B) the continued adherence by the United States to the asserted restriction would make it impracticable to procure the item to which the technical data pertain competitively at a later time.

This requirement also existed in Pub. L. 98-525 and 99-500, its predecessor.

This law is clear in requiring proof of both (1) reasonable grounds and (2) an inhibition on competition before a challenge is initiated. Use of the word "or" linking the parroted statutory requirement and a failure to respond to a voluntary prechallenge request permits avoidance of both statutory requirements (because the contractor or subcontractor failed to respond to the prechallenge request). The Contracting Officer must

have demonstrated reasonable grounds first. The statute requires it! A formal validation challenge based merely upon failure to respond to a voluntary prechallenge review is procedurally abusive and ignores the express statutory due process safeguards. There is a good basis for award of attorney's fees under the Equal Access to Justice Act for bad faith of the Government (see Lear Siegler, Inc. v. Lehman (9th Circuit Court of Appeals No. 86-6496, March 23, 1988)).

The proposed provision requires the Contracting Officer to initiate a formal challenge. Even with reasonable grounds the Contracting Officer should not be required to challenge, because for many reasons it may not be in the Government's best interest. For example the 3 year statutory period may have expired or the technical data being considered for challenge may have become dated or obsolete, etc.

PFA recommends that the DFAR Council seriously rethink it's language here.

227.473-5(a) -

"Available" should be added to avoid an implication that this section adds to remedies otherwise available. If

this section does not add to otherwise available remedies, it should so state clearly.

227.473-5(b) -

See our Comments regarding Clause 252.227-7030, below.

227.475-1(b) -

See our Comments regarding Clause 252.227-7031, below.

The contract or subcontract (schedule) requirements, as applicable, alone determine what data is a deliverable. Abstract reference to the FAR and DFARS is misleading both to the Contracting Officer and the contractor and subcontractors and must be deleted.

227.475-2(b) -

To keep the contractual obligations manageable identification of deferred delivery technical data should be identified in the "DD 1423".

227.475-2(c) -

"[G]enerated as part of the performance of the contract." is not defined. Our suggested language defines it. Here's an example: A lower-tier subcontractor may be unwilling to provide any detailed technical data and, in fact, negotiated in his subcontract to deliver only

limited amounts of technical data. However, at his own expense he was requested to provide a different mounting configuration for his privately developed item. In the redrawing to satisfy this requirement, modifications to detailed drawings are required. It could be argued by the Government using the undefined language that the detailed drawings were "generated as part of the performance of the contract." The Government would claim a right to require such a subcontractor to deliver the drawing which were not paid for by the Government.

The entire genesis of this clause in the ASPR and DAR was that the Government paid for certain line item data in a bona fide R&D contract (or subcontract but didn't want to take delivery yet, or maybe not ever). The clause, as written, has great potential for abuse because it only purports to pay the contractor or subcontractor for the cost to copy the data in the form the agency wants (ie., xerox costs). Our language "clarifies" that policy aspect of using the Clause itself.

In the absence of the additional language the Contracting Officer could use the 252.227-7027 clause to avoid the negotiation provisions at 227.473-1.

227.475-4 -

10 U.S.C. 2320(a)(2)(D)(i)(11) requires the exclusion language and does not permit the reasonable limitation.

227.476(a)(7) -

Unless special works are involved this provision (7) should not be included because it fails to comply with Executive Order 12591 and 100 S.C. 2320(a) in reserving commercial rights to the contractor or subcontractor.

227.480(c)(d) and (e) -

These provisions are inconsistent with 10 U.S.C. 2320(a)(1) and should be deleted.

Part 252 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES.

This Part 252 should be indexed, with the titles of the clauses.

Clause 252.227-7013 - Rights In Technical Data and Computer Software (APR. 1988)

Reference suggestion is editorial.

252.227-7013(a)(1) thru (20) - Definitions

The definitions appear identical to those at 227.471.

On the assumption that they are, our Comments are incorporated and repeated here.

252.227-7013(b)(1) - Unlimited Rights

Unless otherwise noted see Comments at 227.472-3(a)(1), and 227.472-3(a)(2)(ii), which are incorporated and repeated here.

252.227-7013(b)(2) - Government Purpose License Rights (GPLR)

Government disclosure must be limited to the purposes described in the Standard Non-Disclosure Agreement as amended in our text and Comments to 227.473-1(c)(2) above.

The Government's liability is not completely assumed by the recipient executing a Standard Non-Disclosure Agreement. If the Government discloses to another without getting an executed agreement, the Government is liable, not some party who executed an agreement.

A block to enter a subcontractor's and subcontract identity should be added to the legend.

In paragraph (iii), the date of production of a certain number of units is appropriate for the reasons stated in our earlier Comments at 227.473-1(b)(2)(iii)(c). This provision also provides for extending the time limitations.

252.227-7013(b)(3)(i) - Limited Rights

The previous ASPR, DAR, DFARS Schedule agreement terminology has been added as subsection (i) and (ii), (iii) and (iv) are numbered for all the reasons given in our Comments to 227.472-3(b) above.

252.227-7013(b)(3)(iii) -

The Government should be bound by any specific agreement over general requirements otherwise contract negotiations will be unduly burdensome.

252.227-7013(b) LEGEND -

This legend should be indented like the Restricted Rights legend. Clause 252.227-7029 requires this addition to the legend. Also, provide for other than an expiration date as indicated. The parenthetical note should only indicate that an expiration date for limited rights has been agreed to.

Failure to indicate the contrary agreement should not be required. This looks like a trap for the unwary (ie., an agency may infer the 5 year expiration was applicable if there is no written indication to the contrary).

"Minimum" should be stricken because the clause and agreement provide all of both parties rights. The legend should refer to the "contract or subcontract, etc." for its definitions, not these regulations. It'll have to be stamped on a drawing and the regs aren't relevant only an abstract reference to "above paragraphs". The Legend should show an [END] mark.

252.227-7013(c) (1) - Restricted Rights

Forfeiting rights for such minor reasons is inappropriate and of questionable legal force when clauses by number are included in a legend, the applicable date of the clause should be included because there has been so much change and more can be expected.

There are typographical errors in both paragraphs, leaving out language from prior DFARS 52.227-7013 on software. We've added them back in. It should also refer to the "subcontractor" or "subcontract" as appropriate.

252.227-7013(c) (1) (ii) (C) -

As stated this language is too all inclusive and yet may not include those to whom disclosure would be appropriate on a specific license.

This private expense protection should not pertain solely to "commercial" software. The military market software may very well be in that category.

252.227-7013(c) (2) - Unlimited rights (in Computer Software)

These unlimited rights categories should use the definitions to the extent possible. Further, "private expense" development exceptions must be included in (i) and (ii) for the concept of who paid for the data to have any meaning whatsoever.

252.227-7013(f) - Removal of Unjustified Markings

In subsections (1) and (2), the words, "at the contractor's expense" are entirely inappropriate because "Clause 252.227-7037(g) provides for recovery of expense by the contractor or the Government, only as prescribed in detail in that Clause."

252.227-7013(f) (3) -

The "subcontractor" and "subcontract" should be added to the text. The Contracting Officer shall be required

to provided notice to the contractor (or subcontractor, as applicable) within a reasonable time.

252.227-7013(i) - Acquisition of Technical Data/Software from Subcontractors

Our comments to 227.473-2(c) regarding the statutory prohibitions is incorporated and repeated here.

252.227-7013(j) (3) -

See our Comment at clause 252.227-7035 below.

252.227-7013(j) (4) -

See our Comments at Clause 252.227-7038 below.

252.227-7013(k) - Identification (listing) of restrictions on Government rights

Our comments to 227.473-1(c) regarding "Contract Documentation" are incorporated and repeated here also.

Since subcontractors have no right of appeal to a Contracting Officer decision under 252.227-7037, they should have the right to insist on the Government initiating a challenge during the negotiation process so that they know before delivery of their sensitive detailed technical data whether the Government will protect that technical data or not.

252.227-7013(1) - Postaward Negotiation - Disputes

Our comments to 227.473-1(d) regarding "Negotiation Impractical" are incorporated and repeated here also.

These regulations are mandatory flowdowns and yet a subcontractor cannot, without approval of his prime use the prime contractor's name, to appeal the decision of the Contracting Officer. This provision is a denial of due process under the U.S. Constitution. The suggested addition merely recognizes the self help that subcontractors will be forced to resort to.

252.227-7013 ALTERNATE II

Our prior comments in 227.472-3(b) and Clause 252.227-7013(b)(3) which are incorporated and repeated herein regarding the failure to include the right to contract in a Schedule Agreement for limited rights protection.

Further, restricted rights language should refer to a license "or" agreement.

Our Comments to Clause 252.227-7013(c) are incorporated and repeated here.

252.227-7018(b)(2) -

As this provision reads, it requires the higher-tier contractor, to maintain records to justify a lower-tier contractors restrictive markings. In addition to the obvious undue administrative burden on higher-tier contractors, it may give higher-tier contractors access to sensitive lower-tier contractor's justification records in violation of Clause 252.227-7013(i)(2).

252.227-7018(b)(3) -

This will place a significant administrative and cost burden on higher-tier contractors.

252.227-7018(c) -

As stated, this provision would authorize highest-tier contractors to determine whether restrictive markings are to be placed on technical data to be delivered. This would be inconsistent with the property rights and other interests described at 227.472-1 herein and in 10 U.S.C. 2320. The liability exposure of the highest-tier contractor would be substantial and not binding on lower-tier contractors without their concurrence.

252.227-7018(f) -

In the absence of the suggested change the highest-tier contractor is without the authority granted the "Govern-

ment" or "Contracting Officer" (See (c), (d) and (e) above).

252.227-7019 - Identification of Restricted Rights computer Software

Inclusion of this clause prior to announcing a policy in 227.481 will place many unknowns into contracts and subcontracts.

At the time of computing the price and making the offer, the offeror frequently does not know who the subcontractors will be, much less their restricted rights status. If the Government is unwilling to amend the contract, the prime contractor must resolicit to exclude a subcontractor claiming restricted rights or remove the subcontractor's restricted rights legends. Either way, the prime contractor is placed in an unreasonable position. He is exposed to the cost of redesign on the one hand and litigation on the other hand.

Faced with these choices, prime contractors are encouraged to violate the express anti-exclusion prohibition in 10 U.S.C. 2320(a)(2)(F) by excluding any item in which a subcontractor claims restricted rights. To avoid this litigation exposure, the prime contractor

will pressure subcontractors to give up restrictive rights claims. This is certainly inconsistent with "scrupulously" protecting data rights espoused by the DAR Council at 227.472-1(c)(1). This scenario cannot be discounted as unlikely because it is occurring on a number of major programs today under similar regulations.

252.227-7022 - Government Rights (Unlimited)

The clause has potential for abuse unless so changed.

252.227-7026 - Deferred Delivery of Tech. Data, etc.

See our Comments at 227.475-2(b), which are incorporated and repeated here.

252.227-7027 - Deferred Ordering of Tech. Data, etc.

See our Comments at 227.475-2(c), which are incorporated and repeated here. All prior ASPR, DAR and DFARS history of the policy behind this clause is to defer ordering of data fully required and paid for under a Government R&D contract. It is currently being greatly misused in military production firm fixed price contracts.

252.227-7028 - Requirement For Tech. Data Certification

Typo in the reference. See 227-473-1(a)(4) re "notification" and "if any".

With regard to the language changes in the first sentence, the "Offeror", the prime contractor, can't be expected to have access to the required information for notification, much less certify it. The suggested language changes obligate the prime contractor to collect and submit with its offer the notifications of its subcontractors and its own notification. For consistency the "offer", not the "offeror", identifies the information.

252.227-7030 - Tech. Data - Withholding of Payment

This clause imposes an unfairness on contractors and lower-tier subcontractors. Typically, subcontractors deliver technical data to higher-tier contractors many years before delivery to the Government. If the higher-tier contractors accept delivery and pay the lower-tier subcontractors, they run the risk of payment being withheld from them without recourse to the lower-tier suppliers. If he automatically withholds payment from the lower-tier supplier he runs the risk of litigation.

If the question of entitlement to deliver data with "limited rights" or under 227.473-1(d) (ie. negotiation impracticable) is not resolved at time of delivery of the technical data, the contractor, or worse, the sub-

contractor is faced with a dilemma. If he delivers without restrictive marking, he loses the rights he is entitled to assert. If he delivers with restrictive markings, the Contracting Officer can withhold 10% of the prime contract price. This pits the prime contractor and the Government against the subcontractor. This gives the Contracting Officer a grossly unfair bargaining position.

For privately developed items, components and processes the price of the technical data is typically far less than 10% of the total contract price. As individual items on a contract are delivered, the contractor or subcontractor is entitled to payment. Withholding payment of what may be considerably more than the payment due on the individual item alleged to be deficient is so unfair, especially considering the inequality of bargaining position, that even if the data is deficient in some manner, it amounts to a penalty. The amount withheld should be limited to 10% of the price of the deficient item.

The Contracting Officer should be authorized to specify a lesser amount at the time of the withholding.

Withholding does not equate to a forfeiture. If permanent retention is intended, the word "withhold" should not be used. A more descriptive word would be "forfeiture, retention, etc." 10 U.S.C. Sec. 2320(b)(9) limits DoD to "withholding...if the contractor does not meet the requirements...". When the contractor does meet the requirements the DoD's authority to withhold is terminated. The Government should not be permitted to withhold without a reasonable time period being imposed.

252.227-7031 - Data Requirements

Unless we have missed something in our review of the broadly cited FAR and DFARS sections, they do not require "delivery" of technical data. It would greatly simplify solicitation and contract review to delete the indicated phrase unless something specific is contemplated, in which case it should be specifically cited.

252.227-7032 - Rights in Tech. Data, etc. (Foreign)

10 U.S.C. 2320(a)(2)(D)(i)(11) prohibits disclosure of detailed manufacturing or process data delivered by a U.S. manufacturer to a foreign government. Therefore, the reference to "Contractor" must be to a "foreign contractor". This classification is consistent with 227.475-5.

**252.227-7035 - Preaward Notification of Rights in Tech.
Data, etc.**

252.227-7035 (a) -

As explained in our comments at 227.473-1(a)(1), incorporated herein, the words "to the extent feasible" should be inserted as indicated.

252.227-7035 (b) -

The reference should be to (a)(2), versus (a)(ii).

As explained at 252.227-7038, below, "certification" should be changed to "notification."

252.227-7035 (c) -

The Government, as would any contracting party, has obligations imposed by the law of contracts. The Government has a right and obligation to negotiate rights in technical data. The Government's obligation is to negotiate before the technical data is delivered. (See 227.472-3(c)) Failure of the Government to negotiate within the required time should at least create a presumption that the contractor's or subcontractor's assertion is accepted. To permit otherwise would encourage delaying tactics by the Government.

"[E]vidence" is a legal term. Few Contracting Officer's or contractor/subcontractor know what it means with any degree of accuracy. "[J]ustification" is a more appropriate term. If the Government insists on evidence significant costs will be incurred and should be included by contractors and subcontractors in their offers.

As explained at 252.227-7038 "certification" should be changed to "notification."

252.227-7036 - Certification of Tech. Data Conformity

252.227-7036 (a) -

The certification should have a title.

10 U.S.C. 2320(b)(7) requires that delivered technical data "...satisfies the requirements of the contract concerning technical data;". Not only does requiring certification of "all" requirements of the contract go beyond what is required by law, but it requires certification of information beyond the knowledge of the certifying official. These requirements are "mandatory" flowdown; therefore, subcontractors will be expected to execute this certification.

"(T)he" contract refers to the prime contract. Thus, a subcontractor would be certifying to the satisfaction of prime contract requirements. As suggested, the certification should be limited to the requirements of the contract of the certifying official.

This certification is just another form of warranty (or performance guarantee) of technical data very much like DFARS 52.246-7001, referred to above in 227.475-3. That warranty has a 3 year time limit. So should this document.

252.227-7036 (b) -

See our comments in (a) above.

252.227-7037 - Validation of Restrictive Markings, etc.

In PIA's 2/16/87 response to DAR Case 84-187, PIA provided a paper entitled "Validation, An Interim Analysis - January 1987" as Appendix "D". We encourage reference to that paper concerning defects in regulatory language versus 10 U.S.C., Sec. 2031 (introduced by Pub. L. 98-525 and Pub. L. 99-500), which is perpetuated in these new regulations.

252.227-7037(a) - Definitions

The term "reasonable grounds" is such a substantial requirement of P.L. 99-500, 98-525, 100-26 and 10 U.S.C. Sec. 2321 that it should be defined in this clause so that the challenging Contracting Officer knows what standard or burden is placed on the Government. Reasonable grounds is a legal term of art and without a specific regulatory definition the Contracting Officer and contractors will be required to research the caselaw. This will leave a great deal of room for disagreement and subsequent litigation. The legislative history to P.L. 98-577, the companion statute to P.L. 98-525, said that reasonable grounds must be "more than a mere suspicion", in the nature of "probable cause". (See the discussion herein at 227-473-4(b)(3)).

252.227-7037(b) -

This provision is so broadly stated that it is not consistent with 10 U.S.C. 2321. As stated, this provision could be read to mean that the owner of proprietary data is required to maintain records forever. The purpose of the statute in prescribing the three year period was to make the record maintenance burden reasonable.

No obligation exists under 10 U.S.C. 2321(b) unless the technical data was delivered as an element of performance under a Government contract or subcontract.

252.227-7037(c) - Prechallenge Request For Information

Our Comments to 227.473-4(b) are incorporated and repeated here.

252.227-7037(c) (1) -

This provision is so broadly stated that it suffers from the same defect discussed in (b) above. The suggested change is paraphrased from 10 U.S.C. 2321(c).

Since the contractor or subcontractor has previously submitted information requests for additional information should specifically identify the additional information sought. Otherwise, this subsequent submittal may also be incomplete.

The Contracting Officer should provide a reasonable response time.

252.227-7037(c) (2) -

To provide some measure of balance to the prechallenge request, the Contracting Officer should inform the contractor or subcontractor whether or not a challenge is likely.

252.227-7037(c) (3) -

As noted in our Comments regarding 227.473-4(b) (3) herein, 10 U.S.C. 2321(d) (1) requires a "reasonable grounds" finding. Response to a voluntary prechallenge request is not required by this statute, and failure or refusal to incur the substantial cost (and time) to do so does not satisfy the statutory requirement of reasonable grounds. This is a method of boot strapping a situation where the Government has nothing before it except a restrictive legend on a drawing. The typical prechallenge letter is a request for voluminous data in response. This is truly another attempt to subvert the statutory intent in deprivation of private property rights.

252.227-7037(d) (1) -

The Government's right to challenge is restricted to three years (see discussion in paragraph(b) above). The suggested change is paraphrased from 10 U.S.C. 2321(c) (2).

The Contracting Officer could determine to challenge within the three year period and not challenge for an undetermined period of time. This possibility should be eliminated because it is inconsistent with 10 U.S.C.

Sec. 2321(c)(2) which requires the notice of challenge to issue within the 3 year period.

252.227-7037(d)(1)(i) -

The "specific grounds" are specified as "reasonable" at 10 U.S.C. 2321(d)(1)(A). Since the "specific grounds" have not been described as "reasonable" elsewhere in subparagraph (d), such description should be inserted as indicated to avoid a mistaken interpretation by the Contracting Officer that mere "grounds" is required.

252.227-7037(d)(1)(ii) -

10 U.S.C. Sec. 2321(d)(3)(b) does not contain the lined out phrase. Most Contracting Officers are not legally trained and "evidence" is a legal term of art. Contracting Officers should not be required to make important decisions based on a term of the legal art, especially where crucial private rights are at issue.

252.227-7037(d)(3) -

10 U.S.C. Sec. 2321(b)(1) and (2) refer to a contractor's or subcontractor's failure to respond or response to a validation challenge of 10 U.S.C. Sec. 2321(d) as a "response" or "justification". Subsection (g) specifically conditions imposition of the Contract Disputes Act

of 1978 on the contractor or subcontractor making a "claim".

Since a "response" or "justification" is not a "claim", DoD is not authorized to require any response to a subsection (d) challenge to satisfy the requirements of the Contract Disputes Act of 1978. A "claim" under the Contract Disputes Act of 1978 is a demand for relief, whereas a challenge under 10 U.S.C. 2321(d) only questions the propriety of restrictive legends.

In responding to a challenge, the challenged owner of proprietary property is not making a demand for relief; he seeks maintenance of the status quo. This necessitates the imposition of an additional step to provide for a final decision of the Contracting Officer removing the restrictive legend, to which a contractor may then submit a "claim".

PIA's research paper entitled "Validation, An Interim Analysis - January 1987", mentioned earlier and our suggested addition of section (d), makes some suggestions.

Imposition of this section on a subcontractor is arguably a denial of due process under the 5th Amendment of the U.S. Constitution. Since the Contract Disputes Act of 1978 does not authorize a subcontractor to sue thereunder, such a subcontractor has no recourse to the Contracting Officer's decision or right to submit a "claim", even if a procedure were implemented to correct the "claim" deficiency discussed immediately above.

In attempting to place all of the enormous administrative burden associated with Validation on the owner of proprietary rights, the DAR Council has seriously flawed the Validation procedures which will surely lead to litigation.

252.227-7037(d) (4) -

Agreement to be bound by all parties is not required by 10 U.S.C. Sec. 2321(e). The Contracting Officer should not be permitted to defeat the equitable purpose of this statutory provision.

252.227-7037(d) (4) - (New)

Footnotes 52 and 54 of PIA's "Validation, An Interim Analysis - January 1987" clearly demonstrates (via example) that the Navy and Air Force have not been

complying with the statutory "reasonable grounds" requirement. A third party determination made by an independent party (hopefully with Contract Board experience), considerably senior to the Contracting Officer is necessary to provide the appearance of fairness, to inform DoD senior management of the seriousness with which industry views wide spread unjustified validation challenges and to provide constitutional implementation of these validation regulations.

Additional proof of flawed requests for information and validation challenges currently in use are available. This proof demonstrates that inappropriate FORM letters are still being used. This strongly suggests that top DoD management became involved in correcting existing service-wide deficiencies. A repeat of those deficiencies must be prevented by these new regulations, if reasonable implementation of the Validation requirements are to be achieved.

252.227-7037(e) -

As noted in the discussion of subsection (d)(3) above, a validation challenge questions the propriety of restrictive legend marking; it is not a "claim" within the meaning of the Contract Disputes Act of 1978.

Further, since a subcontractor is not in privity of contract with the Government, the subcontractor lacks standing to bring legal action in the Armed Services Board of Contract Appeals (ASBCA), or U.S. Claims Court. Thus, a subcontractor is without an effective right to appeal the Contracting Officer's decision which in view of the requirement to exhaust administrative remedies, may be a denial of the process.

It can be argued that 10 U.S.C. 2321(g) provides ASBCA and Claims Court jurisdiction for subcontractors. However, it is not clear, which places subcontractors in a tenuous position. If subcontractors have such jurisdictional access, it is to be limited to "...a claim pertaining to the validity of the asserted restriction...". This will significantly limit the scope of the action.

In the absence of a failure to effectively resolve these two fundamental flaws in proposed Clause 252.227-7037, the remainder of the clause is flawed. However, we will not continue in subsequent paragraphs to repeat these fundamental flaws.

Any notice of final decision should provide the "specific" findings and conclusions supporting the decision and the determination.

Especially in the absence of a third party method of questioning the Contracting Officer's reasonable grounds to challenge (See added (d)(4) above), it is important that the Contracting Officer not use a failure to respond in lieu of reasonable grounds.

252.227-7037(f)(1) and (f)(2)(i) -

The purpose of the suggested provision is apparent.

252.227-7037(f)(2)(i) -

See comments to paragraphs (e) and (d)(3) above.

252.227-7037(f)(2)(ii), (iii) and (iv) -

The stricken portion of these sentences is oppressive and of questionable value in any subsequent legal action. The purpose that it may serve is to discourage the less sophisticated small subcontractor from pursuing legitimate legal rights. The Government should be willing to stand on the merits of the decision it has made.

252.227-7037(f)(2)(iii) and (iv) -

Such agency head determinations are not specifically authorized by 10 U.S.C. Sec. 2321. Therefore, justification is necessary to avoid abuse.

252.227-7037(h) -

Insertion of the suggestions made in earlier sections precludes the necessity of this provision.

The suggested additional sentence is to discourage challenging Contracting Officer from threatening a subsequent challenge in circumstances where a challenge is not authorized, for example after the three year period has expired. This technique is currently in widespread use on requests for information.

As previously noted, the three year period was inserted in the statute to ease the record maintenance burden. Since lower-tier subcontractor frequently deliver their technical data to higher-tier contractors long before the technical data is delivered to the Government, Subcontractors, on a given program, may be required to maintain records far beyond the three year statutory period.

Regarding the deletion of the last two sentences in the absence of fraud or similar conduct, the Government should be bound by its agreements.

252.227-7037(i) -

On what legal basis is the Contracting Officer authorized to "transact matters"? The basis must be contractual. If the Contracting Officer is transacting contract matters, then privity of contract arguably exists. Subcontractors should not agree to this strange provision.

252.227-7038 - Listing and Certification of Development of Technology With Private Funding

10 U.S.C. 2320(b)(5) requires that technical data to be delivered with restrictions on the Government's right to use it be "identified". Neither this provision, nor any other requires "certification". Requiring the offeror to provide notice will add significant administrative costs. Requiring "certification" will encourage prime contractors to seek methods to avoid the anti-exclusion prohibition of 10 U.S.C. 2320(a)(2)(F) with resultant civil liability. Therefore, where used, "certification" should be altered to "notification", including the title blocks, etc.

With regard to paragraph (a), how is a contractor to know what is "...sufficient descriptive information to enable the Contracting Officer..." to evaluate anything? It depends on many factors, not the least of which is

the Contracting Officer himself. This appears to be another example of shifting unreasonable burdens on industry in implementing the data rights policy.

The deleted language of provision (1)(ii) of the certification implies that the developer of technical data developed at private expense does not have a right to deliver technical data with restrictive legends. 10 U.S.C. 2320(a)(2)(B) grants the right to do so.

The notification requirement would add significant administrative costs to all "offerors" bidding Government prime contracts; requiring certification would seriously impact the offeror's ability to propose and/or bid in the time period normally provided. Notification of the cost information required by (iii) and (iv) would further complicate the bidding/proposing process. Certifying the cost information during the normal cycle time period is ridiculous. This process encourages the prime contractor to violate 10 U.S.C. 2320(a)(2)(F). It should be clear that the information sought should only be required from the winning offeror and that a reasonable amount of time must be provided to collect this information from the tiers of subcontractors.

Subparagraph (2) of the certification or notice could easily produce a forfeiture of lower-tier contractor's proprietary rights. If a higher-tier contractor does not provide notification or certification either during the bidding or performance phase, this failure by the deleted language purports to defeat lower-tier contractor's rights. Such language is extremely unfair and legally questionable. It exposes higher-tier contractors to unnecessary litigation liability and raises questions about the seeming reasonableness of the acquisition policy. (See 227.472-1).



The University of Iowa

Iowa City, Iowa 52242



Office of the Vice President for
Educational Development & Research,
Dean of the Graduate College

(319) 335-2144

May 23, 1988

Mr. Charles W. Lloyd
Executive Secretary
ODASD(P)DARS
c/o OASD(PL) (MRS)
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

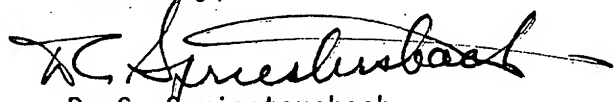
On behalf of the University of Iowa I wish to express my strong support of the position paper developed by the Council on Governmental Relations in response to the interim rule published at 53 FR 10780 under the DFARS Subpart 227.4-Technical Data, Other Data, Computer Software, and Copyrights and the clause at 227.252-7013.

Our representatives on this Council have carefully analyzed the effect of these proposed rules on software, engineering drawings, and other technical data generated by Federal grants and contracts and feel that it is imperative that to facilitate effective transfer of university generated technology requires a Federal policy for technical data and software similar to that for patentable inventions.

The proposed changes that have been sent to you by the Council on Governmental Relations would be an important step in achieving that goal.

Thank you for giving careful consideration to their proposal.

Sincerely,


D. C. Spriestersbach
Vice President and Dean



MOTOROLA INC.

May 20, 1988

Mr. Charles W. Lloyd
Executive Secretary
DAR Council
OSASD(P)/DARS
c/o OASD (P&L) (M&RS) Room 3D139
The Pentagon
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

We appreciate the opportunity to provide comments on the interim rule "Patents, Data and Copyrights" published in the Federal Register April 1, 1988 (DAR Case 87-303).

Overall we are apprehensive about the detail record keeping requirements intimated by the proposed rule. We have not been able to cost the administration of this rule but believe it will be significant.

We do wish to provide the following specific comments on the interim rule:

252.227-7035 Pre-award Notification of Rights in Technical Data and Computer Software

✓ This solicitation provision requires the Offeror to notify the Contracting Officer of the Offeror's or its potential subcontractor's proposed use of items, components, processes and computer software in the performance of the contract that will be delivered with less than unlimited rights. There should be some firm definition as to what constitutes a "potential subcontractor" so that the Offeror is not required to query down to the level of each and every piece-part supplier. It is suggested that this cut-off point be at \$25,000. This level is deemed appropriate due to the exclusion of contracts or orders less than \$25,000 from the Data Requirements clause in accordance with DFARS 227.475-1(a)(1).

252.227-7038 Listing and Certification of Development of Technology with Private Funding

The certification in this clause states, in part:

"(1) The Offeror/Contractor certifies that, to the best of its knowledge and belief, the following information is current, accurate and complete:"



Mr. Charles W. Lloyd

May 20, 1988

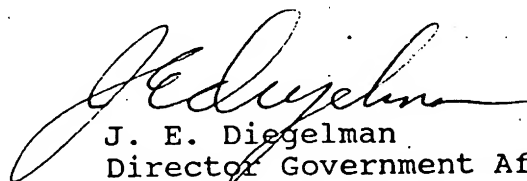
The phrase "current, accurate and complete" would imply that this certification has the same force and effect as a Certificate of Current Cost or Pricing Data under FAR Subpart 15.8 - Price Negotiation. This cannot be true because the development cost information to be provided will be, in most cases, estimates based on recorded costs accumulated at a level higher than the component that was developed. Contractors should not be required to collect costs at a level low enough to be identified solely for "private expense" purposes. For these reasons it is strongly suggested that the Certification, subpart (1) be revised as to read: "(1) The Offeror/Contractor certifies that the following information is correct, to the best of its knowledge and belief."

There is a conflict between the clause at 252.227-7035- Pre-award Notification of Right in Technical Data and Computer Software and the clause at 252.227-7038 - Listing and Certification of Development of Technology with Private Funding.

The -7035 clause says the Offeror will list items, components, processes and computer software that are proposed to be used in the performance of the contract.

The -7038 certification says the Offeror will identify items, components, processes and computer software which he intends to use in the performance of the contract and which the technical data pertaining thereto will be delivered to the Government marked with other than unlimited rights.

The -7035 clause should be corrected to conform to the certificate clause -7038, because rights in technical data and computer software apply only to those items that are specified for delivery. See DFARS 252.473-1(e).



J. E. Diegelman
Director Government Affairs

JED:cw

87-303



UNIVERSITY OF MISSOURI

University Patents & Licensing

Office of the Director

509 Lewis Hall
Columbia, Missouri 65211
Telephone (314) 882-2821

May 19, 1988

Mr. Charles W. Lloyd
Executive Secretary
ODASD(P)DARS
c/o OASD(PL)(MRS)
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

The University of Missouri desires to comment in general terms with respect to the interim rule published in 53 FR 10780 concerning Technical Data, Other Data, Computer Software and Copyrights. The University also wishes to lend its support and concurrence with the response filed on May 11, 1988, by The Counsel on Governmental Relations (COGR).

Public Law 96-517, as amended, has greatly enhanced the transfer of valuable technology developed under federal funds to commercial and industrial uses. It has succeeded in helping to forge new and stronger alliances between universities and industry. These alliances have led to increased research support for universities and made available to industry a high level of scientific and technological competence. In many instances a true synergism has developed through this interaction.

In a similar manner, the government has responded very favorably in terms of protecting the publication rights of scientific results developed by faculty under federal grants and contracts. The policies adopted in the Code of Federal Regulations clearly acknowledge the principle of academic freedom and the need to freely exchange scientific knowledge in order to facilitate the advancement of science. The President has even issued a directive from the White House that maximizes the opportunity for publication of research results even when the research is funded by the Department of Defense so long as the publication represents the results of basic research and so long as the release does not constitute a threat to national security.

So, on the one hand, we find that University technology developed under federal funding is protected by regulations regarding inventions. On the other hand, we find that universities are free to publish the results of their research in scientific journals. But for some reason computer software and technical data, which seem to fall somewhere between inventions and publications, are unprotected. The benefits,

COLUMBIA KANSAS CITY ROLLA ST. LOUIS

an equal opportunity institution



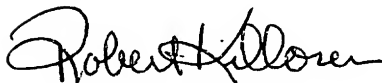
however, that could possibly accrue to society may be just as likely through the technology transfer and commercialization of computer software as with any invention or scientific publication. For example, a university might be working under contract with an army medical research group on a computer software program that would allow medics to make appropriate medical diagnoses in emergency situations when a doctor cannot be reached. Such a software program, however, might also be very valuable to communities that have emergency paramedic programs. Under the proposed regulations such software might never be available to communities.

One might argue that the regulations have exceptions that could be called upon that would allow for the transfer of this type of computer software. Our experience, however, has been that contracting officers rarely call upon the exceptions. They are more likely to view negotiations as a contest to see how many rights can be preserved for the government. This observation represents real experiences the University has had with contracting officers on computer software projects and are not just speculation.

The University strongly supports the COGR recommendations, a copy of which is attached. The University would only add that even when contracts are issued specifically for the development of computer software that the government consider the possibility that such software might also have civilian uses that could be commercialized for the betterment of society. In these cases a university should be allowed to maintain rights in the software and license it for commercial development, so long as the government was given free access to the software to make and distribute it internally.

The University appreciates this opportunity to comment on these regulations.

Sincerely,



Robert Killoren
Director

cc: Milton Goldberg, COGR

Attachment 1 - TESTIMONY

COMMITTEE ON SCIENCE, SPACE AND TECHNOLOGY
SUBCOMMITTEE ON SCIENCE, RESEARCH AND TECHNOLOGY
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

FACILITATING ACCESS TO SCIENCE AND TECHNOLOGY

BY

GEORGE H. DUMMER
DIRECTOR, SPONSORED PROGRAMS
MASSACHUSETTS INSTITUTE OF TECHNOLOGY

ON BEHALF OF THE COUNCIL ON GOVERNMENTAL RELATIONS

APRIL 30, 1987

My name is George Dummer and I am the Director of the Office of Sponsored Programs at the Massachusetts Institute of Technology. With me is Mr. John Preston, Director of the MIT Technology Licensing Office.

I am speaking today on behalf of the Council on Governmental Relations, an organization of more than 120 colleges and universities engaged in a broad spectrum of federally and privately funded research programs.

The Chairman has invited my comments with respect to the President's Executive Order of April 10, 1987, entitled "Facilitating Access to Science and Technology," and to particulars and/or general issues which it addresses.

I would like to respond by focusing on one very important particular, namely, Section 1(b)(6), which provides for "the development of a uniform policy permitting Federal contractors to retain rights to software, engineering drawings, and other technical data generated by Federal grants and contracts, in exchange for royalty-free use by or on behalf of the government."

Contractor Ownership of Technical Data and Software

We strongly endorse the development of such a policy. Without it, the contribution which the government-university-industry relationship makes to this country's competitiveness will not achieve its full potential.

Government funding of university research provides a rapidly growing pool of research results with the potential for early industrial application, particularly as new technologies are created directly out of basic research, such as laser, optic fibers, integrated circuits, and the biotechnologies.

Earlier this morning, Dr. Graham mentioned recent breakthroughs in superconductivity. We are all aware, for example, that superconductivity has been achieved at -238 F. by Professor Chu's team at the University of Houston.

Suddenly, superconducting materials hold promise of making it economical to create tiny, superfast computers, magnetically floating trains, and long distance power lines that waste no energy.

Scientists around the world are reportedly eating and sleeping in their laboratories as they try to vault into the lead in the application and commercialization of superconductivity in a new and exploding market.

In this fast moving environment, we must continually ask ourselves what is necessary for the rapid and successful transfer and commercialization of this and other technologies which are created out of university research funded by the Federal government.

There are many answers because they are many elements which are essential to the transfer process. One of them, however, is a government policy which provides at the outset, not through the waiver process, that -

The ownership and the right to disseminate the research result and transfer the technology remain in the university which created it, and

The rights acquired by the government are adequate to meet essential government purposes, but not so broad as to inhibit the transfer of the technology or discourage industrial companies from investing in its further development and commercialization.

And the government has, at least in part, had such a policy since 1980, when P.L. 96-517 gave nonprofit organizations and small businesses the right to own and to commercialize patentable inventions resulting from Federally funded research grants and contracts.

Impact of P.L. 96-517

In my view, P.L. 96-517 and the amendments of P.L. 98-620, have had a significant and positive impact, starting with the elimination of some 26 different Federal patent policies, many of them involving the cumbersome waiver procedures which large business contractors find so troublesome today.

In addition, P.L. 96-517 has facilitated stronger research relationships between universities and industry. It has also encouraged the creation or expansion of university activities directed toward the transfer of university generated technology.

The MIT Technology Licensing Office which Mr. Preston directs is typical of the kind of activity in which a growing number of universities are engaged. It involves the transfer of technology by individuals with technical backgrounds and business experience who understand both the technology and the complications of transferring it to the commercial sector.

Dealing with Multiple Intellectual Property Rights

As universities have become more active in technology transfer, however, it has become increasingly obvious that the effective transfer of university generated technology requires dealing with a combination of intellectual property rights.

For example, a number of universities, including MIT, are working on nuclear magnetic resonance (NMR) imaging devices because, unlike x-rays used in CAT scans, magnetic fields have no known toxic side effects. But to achieve the accuracy of CAT scanned images requires a sophisticated and integrated hardware and software system.

Another example is symbolic processing, the backbone of artificial intelligence technology. Developed at MIT, it consists again of a combined hardware and software system which allows computers to simulate human problem solving and data processing techniques. The hardware design and its software, LISP, have been licensed by MIT to various companies, and LISP circuits are finding their way into many new applications.

Finally, one of the best examples of technology embodying multiple intellectual property rights is an integrated circuit, which may involve a copyrightable pattern-generating software program, a chip design copyright under the Semiconductor Chip Protection Act of 1984, a patent on the novel functions performed by the integrated circuit, and very possibly a trademark.

The consequence is that the effective transfer of university generated technology involving a combination of intellectual property rights requires a Federal policy for technical data and software which parallels that for patentable inventions. Such a policy would permit the transfer of that technology in a coherent manner without regard to the forms of legal protection involved.

Such a policy would also recognize that technical data, and software in particular, are most effectively transferred by the authors and creators. Software is normally in a state of continuing development and enhancement, and its successful dissemination and commercialization frequently requires the continuing involvement of the original authors who created and understand its architecture and the intricacies of its source code.

The Inconsistency of Current Federal Policies

However, as elaborated in my prepared statement, current Federal policies with respect to technical data and software are not consistent with federal policy governing rights in patents.

Furthermore, Federal rights in technical data and software are determined on the basis of criteria which are exceedingly difficult to apply, given the nature of university research.

And current Federal agency regulations inhibit the conduct of university research and the dissemination of the results, particularly those regulations which reflect the view that it is the prerogative of Federal sponsors to disseminate through their own distribution programs the technology created by their contractors.

Recommendation

We, therefore, endorse Section 1(b)(6) of the April 10 Executive Order and recommend that any uniform Federal policy provide that:

- The ownership of software and other technical data remain in the contractor;

- Any rights which the government obtains to technical data or software be limited to rights in data specifically required to be delivered or prepared under the terms of the contract or grant; and
- The Government acquire a royalty free license to use such technical data or software for specific government purposes, but not including the right to use it in a manner which might inhibit the transfer and commercialization of the technology by the university which created it or by the university's licensees.

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COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
U.S HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

SUBCOMMITTEE ON SCIENCE, RESEARCH AND TECHNOLOGY

HEARINGS ON THE ROLE OF SCIENCE AND TECHNOLOGY IN COMPETITIVENESS

April 30, 1987 - 9:30 - 1:00
2318 Rayburn House Office Building

WITNESS LIST

PANEL I

Hon. Dale Bumpers
U.S. Senate
Washington, DC

Hon. Ron Wyden
U.S. House of
Representatives
Washington, DC

PANEL II

Dr. William Graham, Director
Office of Science and Technology Policy
Washington, DC

PANEL III

Mr. George H. Dummer
Director
Office of Sponsored Programs
MIT
Cambridge, MA

Mr. William Carpenter
Martin Marietta Energy
System, Inc.
Oak Ridge, TN

PANEL IV

Mr. Michael Farrell
General Counsel
Department of Energy
Washington, DC

PANEL V

Richard G. Geltman, Staff Dir.
Committee on Economic Dev
and Technical Innovation
National Governors' Assoc.
Washington, Dc 20001

Dr. Frank H.T. Rhodes
President
Cornell University
Ithaca, New York

Joe Kazmarek
Impact Technology, Inc.
Bethlehem, PA

Attachment 2 - GENERAL COMMENTS

1. GOVERNMENT ACQUISITION OF UNLIMITED RIGHTS TO ALL DATA GENERATED

The Government's acquisition of unlimited rights to technical data and computer software under 227.472-7013, which extends to everything generated, originated, developed, etc., in the course of a contract, is so broad that it creates a number of serious difficulties for universities and for other organizations performing Government research contracts.

Discouraging University-Industry Interactions

Prior to the passage of Public Law 96-517, many industrial companies were reluctant to support university research in areas of concurrent federal support. There were a variety of federal policies with respect to rights in inventions and no assurance in many that the university would be permitted to retain title and to license the industrial sponsor on an acceptable basis. Where rights could only be acquired by a time-consuming waiver process, there was no certainty of success. After the passage of P. L. 96-517, when the universities were in a position to retain title to inventions resulting from Federal projects and license them on reasonable and predictable terms, industrial companies showed significantly more enthusiasm for funding research in areas of Federal interest and acquiring license rights and reduce to practice those inventions which were conceived with Federal research funding.

The same situation exists today with respect to computer software and other technical data as existed for patentable inventions prior to 1980. Industrial companies are reluctant to fund the development of software at universities when a Federal agency acquires unlimited rights in all software developed, whether or not the government has a need for it, and is in a position to make that software available to all comers without restriction.

These views are substantially the same as those expressed by Federal laboratory officials as reported in the GAO study "Technology Transfer - Constraints Perceived by Federal Laboratories and Agency Officials" (GAO/RCED-88-116BR), which was issued in March 1988. As summarized in the transmittal letter (B-207939) to that report, the findings dealing with computer software are as follows:

"In summary, the federal laboratory and agency officials we interviewed support the thrust of legislation and executive actions during the past 10 years to improve the link between the federal laboratories' technology base and U.S. business. These laws authorize federal laboratories to patent and exclusively license inventions and collaborate with businesses on research and development. Many of these officials stated, however, that the four identified constraints need to be addressed to further improve the effectiveness of their laboratories' technology transfer efforts. They believe that removing or reducing these constraints would (1) provide more incentives to transfer computer software technology to U.S. businesses, (2) encourage U.S. businesses to make better use of federal laboratory resources, and

(3) reduce administrative burdens and time delays for interactions. The following paragraphs elaborate on each of the four perceived constraints.

"Officials at 7 of the 10 federal laboratories and 5 of the 6 federal agencies stated that technology transfer is constrained by legislation that requires federal agencies to publicly disseminate computer software. They noted that although the Patent and Trademark Amendments of 1980, as amended, authorize federal agencies to patent and exclusively license inventions and permit most contractor-operated federal laboratories to elect to retain title to inventions that they make, the act does not address computer software, which is considered technical data and normally cannot be patented. The officials propose that federal law be amended so that the transfer of computer software would be treated similarly to federal inventions because (1) no apparent reason exists for treating federal laboratory inventions and computer software differently, (2) as with inventions, the most effective way to transfer computer software in many cases is to copyright and exclusively license it to a software company, (3) federal employees who develop computer software do not have the same incentives to commercialize it as those who make inventions because they cannot share in royalty income, and (4) most federal programs to publicly disseminate computer software provide foreign business competitors equal access to the software."

The remaining three perceived constraints relate to limitations on the authority to conduct proprietary research, delays in obtaining waivers of DOE's title rights to inventions, and concern that industry interest may be inhibited by burdensome procedures for entering cooperative agreements.

Identifying Data Generated in Performing Contracts

It is a formidable task to identify "all data or computer software 'produced' or 'generated' or 'developed' in the performance of basic and applied research, particularly when it is not related to specific items, components or processes and is not specified in the contract for delivery.

In performing research, including that funded by third parties, the faculty members and their research teams follow their own long term professional and scholarly interests and agendas. The research, therefore, tends to be a continuum which builds a base of experimental results and data which, over the years, is expanded, refined, and perhaps integrated with other research results in an interdisciplinary environment.

The research team is not assembled to conduct a sponsor-initiated project and disbanded or reconstituted for the next assignment when that one is completed. It is usually already in place, pursuing its own agenda. What it agrees to do in accepting federal or private research funding is to devote some portion of its total effort, for a stated period of time, to applying its cumulative experience and expertise to a particular problem or application which is of interest to the sponsor and gives the university

research team an opportunity to advance the state of the art. Consequently, the data and software which it generates is the cumulative results of a continuing program which cannot be frozen in time.

FCCSET Policy Statement

In sharp contrast to the policy reflected in the interim rule, a government-wide data policy statement developed (but never issued) by a subcommittee of the Federal Coordinating Council for Science, Engineering and Technology (FCCSET) contained the following statement in its February 1985 revision. Although the subcommittee was disbanded before issuing a final policy statement, the language is particularly realistic from a university standpoint:

"...It must also be recognized that in many cases the data will build upon past experience, expertise, know-how and organizational abilities which the contractor or subcontractor brings to the project. As a practical matter, it is not likely that a meaningful segregation can be made between the know-how and expertise generated under the contract and the know-how and expertise which the contractor previously possessed and applied to the contract."

" Any rights which the government obtains to technical data will be limited to rights in data specifically required to be delivered or prepared under the terms of the work statement, reporting requirements, or specifications of the contract or grant. Broad and sweeping terminology giving the government rights in 'all data first produced or generated in the course of or under this contract' or 'in all data generated under this contract whether or not delivered' should be avoided."

This, of course, is particularly true of software, which is constantly being developed, refined, debugged, enhanced, used for derivative works, and issued and reissued in successive releases.

Pall Corporation

30 Sea Cliff Avenue · Glen Cove, N.Y. 11542 · USA
Phone 516-671-4000 · TWX 510-223-0606
Telex 126329 · Cable Pallco Glen Cove

Sent Via Federal Express

Page 1 of 2

27 May 1988

Defense Acquisition Regulatory Council
Att: Mr. Charles W. Lloyd, Executive Secretary
ODASP (P) DARs, c/o OASD (P&L) (MRS)
DAR CASE 87-303
THE PENTAGON
WASHINGTON, DC 20301-3062

SUBJECT: Comments on New Interim DoD Data Rights Regulations Effective 4 April 1988

Dear Mr. Lloyd:

Pall Corporation is an active member of the Proprietary Industries Association (PIA) and fully supports the separate comments that you will be receiving on this subject from PIA. Pall Corporation appreciates the fact that an effort has been made to produce a balanced Data Rights Regulation. However, as will be outlined in complete detail in the PIA comments, we do not think these regulations have achieved that goal.

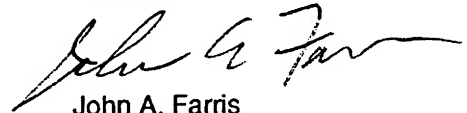
Pall Corporation is very concerned that there continues to be a lack of recognition within DoD of the substantial contributions that have been made and continue to be made by the innovative subcontractors supporting the Defense Industry. The superiority of DoD weapons systems are, in no small part, due to the fact that they contain hundreds, if not thousands, of proprietary and innovative products that were developed at private expense. These products were developed when the DoD business climate was very different as compared to today. In this prior climate, the innovative subcontractor was encouraged to make private investments to advance the state of his particular art. If he did a good job, he had a reasonable expectation of a growing and stable military business.

The business environment of the Defense Industry has changed for us in a negative way. For example: (1) We now find that we have a reduced profit and return on investment for our military business. (2) Our innovative products, all of which were developed at private expense, are under constant attack by both DoD and the primes who want us to give our data rights away in the name of competition from clone type firms who will often be cheaper since they do not have the overheads we must have in order to innovate. The end result, for Pall Corporation and for many other similar innovative subcontractors whose business is shared between the commercial sector and the military sector, is to emphasize our privately funded development work in the commercial sector, with a significant reduction of innovation for the military sector.

Page 2 of 2
27 May 1988

We regret this turn of events that has resulted in some of the best innovative companies de-emphasizing innovation in the military area. However, the current DoD business climate leaves us no choice if we are to protect our new developments, our investment, and our stockholders. It is hard for us to believe that this current regulation and these DoD practices serves the best, long term interests of the United States; particularly in the areas of development of the most advanced weapon systems and defense readiness.

Sincerely,



John A. Farris
Vice-President
New Market Development
Pall Corporation

JAF:LR

CC: J. Campolong
J. Johnson

A.Krasnoff
H. Petronis

PIA

Allied-Signal Aerospace Company

9851 Sepulveda Blvd.
P.O. Box 92248
Los Angeles, CA 90009-2248
(213) 776-1010



87-303

27 May 1988

Defense Acquisition Regulatory Council
MR. CHARLES W. LLOYD, EXECUTIVE SECRETARY
ODASP (P) DARS, C/O OASD (P&L) (MRS)
The Pentagon
Washington, DC 20301-3062

Subject: Interim Regulation Rights in Data
DAR Case 87-303

Gentlemen:

Allied-Signal Aerospace Company, a unit of Allied-Signal Inc., is one of this country's largest and most varied subcontractors in aerospace markets. Since its formation, Allied-Signal Inc. has been one of the leading companies in the United States in terms of patents issued, a reflection of the investment made as a continued policy of innovation. This unit of Allied-Signal Inc. invested \$310 Million in self-funded research and development in 1987, only a portion of which was recovered in our negotiated rates. This investment leads to the manufacture of new and improved products which are applied to increased performance, greater efficiency and reliability in commercial and military vehicles and other applications. Like any other business, these investments by Allied-Signal Aerospace Company must be funded with revenues out of profits from continued sales of the product and associated services.

As a major first level subcontractor, it is not likely that we will independently completely develop a final product for use by the military, but rather that we utilize the results of our investment, which has produced demonstration units, new processes, etc. which are later applied to a particular military program. Often, our research and development efforts are directed toward a fulfillment of a perceived need of the Government. Indeed, if we are to receive approval for inclusion of projects in our planned Independent Research and Development activity for cost recovery purposes, there must be some reasonable expectation of applicability to a Government need or objective.

Many of the product lines of our company are common to the commercial as well as the military aerospace markets. Availability from the Government of our technical data to others, even for Governmental purposes only, inevitably leads to encroachment into our commercial markets in addition to the reduction in sales of the direct Government products. These substitute sellers are enabled to enter both markets without the research and development investment, or with minimal investment and compete for the continued sales necessary for our continued participation in this marketplace.

We believe that the interim regulations published in the Federal Register on April 1, 1988 (FR) are drafted such as to make it seemingly impossible for Allied-Signal Aerospace Company to continue receiving sufficient benefit from its investment to make it worthwhile to continue such expenditures and apply the results to the Government marketplace.

The new restrictions on what may be considered wholly private expense and in what circumstances are so restrictive that it appears we will be unable to protect our legitimate investment under the normal circumstances of contracting within this market.

The regulations have other problems which directly affect the soundness of our business future and which we strongly consider should be modified. We are submitting detailed comments on several major items for your consideration in establishing a final rule. We also endorse the more extensive comments of the Proprietary Industries Association on the proposed regulation.

We thank you for the opportunity to make our concerns known to you.

Very truly yours,



P. L. Kearney
Director
Contracts

/h

COMMENTS
INTERIM DOD DATA RIGHTS REGULATIONS
DAR CASE NO. 87-1303

1. In 227.471 and 252.227-7013 the definition of "Developed Exclusively with Government Funds" permits that items which were not paid for by the government but for which development was required as an element of performance under a government contract or subcontract are to be treated as having been developed exclusively with government funds. This definition which calls for either direct government funding or required as an element of performance under a government contract is objectionable and poses serious problems. Further, the new DFARS have made the problem worse by adding a definition of 227.471 (1b) "Required as an Element of Performance Under a Government Contract or Subcontract". This definition provides that such items are those for which the development was specified in a government contract or, that the development was necessary for performance of a Government contract or subcontract. This presents serious problems in that with these definitions the government can reach to privately developed items (background technical data) which were developed at private expense and thereby obtain unlimited rights to the data for such items. For purposes of comment it is suggested that the definition of "Developed Exclusively with Government Funds" be revised to provide that the cost of development was directly paid for in whole by the government and that the development was required as an element of performance under a government contract or subcontract. To be consistent, it is suggested that "Developed Exclusively at Private Expense" should be revised to require that no part of the cost of development was paid for by the government or that the development was not required as an element of performance under a government contract or subcontract. Further, the definition for "Required as an Element of Performance Under a Government Contract or Subcontract" should be changed to delete the last few lines: "or that the development was necessary for performance of a government contract or subcontract".
2. In 252.227-7013 (2) there is set forth an exception to unlimited rights defined as Government Purpose License Rights (GPLR). Section 252.227-7013(b)(2) provides that GPLR shall be effective for a specified time period after which the GPLR will expire and the government will be entitled to unlimited rights.

It will be expected that this expiration will significantly negatively impact on commercialization of items developed for the government under a government contract even if substantial private investment was made (which would normally be the case if GPLR is considered).

At the very least, if a time limit is to be set forth, it is suggested that 227.473-1(b)(iii) (B) be revised to provide that time limitations for GPLR and Limited rights greater than 10 years (as opposed to 5 years) may be negotiated to provide the contractor a reasonable opportunity to recover its private investment. Preferably, GPLR in data should not be effective only for a specified time period; but, such data should always be subject to only GPLR.

3. We note in 252.227-7013(k) that for identification, technical data is now treated in a manner similar to the manner computer software was previously treated under the old DFARS. We are concerned with the requirement that prior to delivering technical data or offering to deliver technical data with limited rights, that such proposed delivery has to be made a part of the contract. Under section 7013(b)(ix) technical data delivered under the contract which at the time of delivery are not identified in the listing required by Paragraph (k) of the clause will be delivered with Unlimited rights to the government.

This represents an enormous practical problem for the subcontractor, without priority or access to the government, likely selected after the contract has been awarded. Despite successful avoidance of the other problems with this regulatory scheme, the subcontractor can find itself having lost its proprietary rights through no fault of its own. It is obvious that this problem is exacerbated as one proceeds lower in the hierarchy of subcontracting.

The administrative barriers set up by this provision will not only have a substantial affect on Allied-Signal Aerospace Company, we believe, but will profoundly affect the vast number of small innovative component firms upon which we, the prime contractors and the government depends.

HARVARD UNIVERSITY
OFFICE FOR SPONSORED RESEARCH



HOLYOKE CENTER, FOURTH FLOOR
1350 MASSACHUSETTS AVENUE
CAMBRIDGE, MASSACHUSETTS 02138

May 26, 1988

Mr. Charles W. Lloyd
Executive Secretary
ODASD(P)DARS
c/o OASD(PL)(MRS)
Room 3D139, The Pentagon
Washington, DC 20301-3062

Re: DAR Case 87-303

Dear Mr. Lloyd:

I write to provide Harvard University's comments on the interim rule published at 53FR10780 regarding Patents, Data and Copyrights.

In general, we find the rule to be a reasoned attempt to formulate a regulatory approach to technology transfer under DOD contracts.

However, we would like to make several suggestions for revisions which recognize the unique concerns of educational institutions. As you know, a significant portion of the basic research funded by the Department of Defense is performed by educational institutions and these institutions can (and should) play a major role in the dissemination of the results of federally funded research.

Our suggestions are as follows:

. Under 227.472-1(b) - Add the following sentence:

"Universities and other nonprofit organizations, on the other hand, play an important role in disseminating the results of fundamental research to the industrial sector and government policy should not inhibit that transfer."

. Under 227.472-2(c) - Add the underlined phrase so that the second sentence reads as follows:

"When the Government pays for research and development, it has an obligation to foster technological progress through wide

dissemination of the information by the Government or through technology transfer programs conducted by the contractor and, where practicable, to provide competitive opportunities for other interested parties."

. Minimum government needs. Under 227.472-2, add the following:

"Where the technical data or computer software results from research and development contracts and does not pertain to items, components or processes to be competitively acquired or needed for repair, overhaul or replacement, DOD will encourage dissemination and commercialization by the contractor."

. Technical data. In the clause at 252.227-7013 under (b)(1), Unlimited Rights, (and in the text at 227.472-3 (a)(1)), revise (i) and (ii) to add the underlined language:

"(i) Technical data pertaining to an item, component, or process which has been or will be developed exclusively with Government funds provided the contracting officer has identified a specific need for the data and that need cannot be met through other means."

"(ii) Technical data resulting directly from performance of experimental, developmental, or research work where delivery of such data was specified as an element of performance under a Government contract or subcontract."

. Computer software. In the clause at 252.227-7013, under (c)(2), Unlimited Rights, revise (i) and (ii) by adding the underlined language:

"(i) Computer software resulting directly from performance of experimental, developmental, or research work where delivery of such software was specified as an element of performance in this or any other Government contract or subcontract."

"(ii) Computer software required to be originated or developed under a Government contract, or generated as a necessary part of performing a contract, where delivery of such software is specified as an element of performance."

. We recommend that 227.472-3(a)(2)(ii)(B) be omitted and a new section added:

"(iii) When the government does not require immediate use of the data for competition and the contractor is a university or other nonprofit organization which has an interest in commercializing the data, the contracting officer will accept Government Purpose License Rights, which will expire after a specified period of time."

. With respect to computer software, in the clause at 252.227-7013, revise (c)(1) Restricted Rights by adding a new

subparagraph (iii) which would parallel the proposed new subparagraph (iii) under GPLR above:

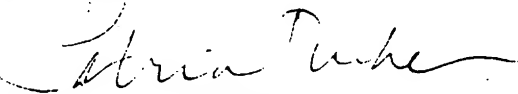
"(iii) In cases where the Government would otherwise be entitled to unlimited rights, unless the Contracting Officer determines during the identification of needs process that unlimited rights are required for the purposes of competitive procurement of supplies or services, the contracting officer shall agree to accept restricted rights when the contractor is a small business or nonprofit organization which agrees to commercialize the technology."

. Add the following new subparagraph to (b)(2)(ii):

"(D) When the government does not have a need to use the data for competition and the contractor is a university or other nonprofit organization which is interested in commercializing the data, the government will negotiate Government Purpose License Rights which will expire if the contractor fails to make reasonable efforts to pursue commercialization."

With my thanks for your interest and attention,

Sincerely,



Patricia Tucker
Director,
Awards Management and
Resource Information

PT:gc



The Electronics Group

RACAL-DANA

RACAL-DANA INSTRUMENTS INC.

4 Goodyear Street, 92718-2002 • P.O. Box C-19541, 92713-9514, Irvine, CA
Telephone (714) 859-8999, TWX 910-595-1136, Telex 678-341, TRT 188715

87-303

May 27, 1988

Mr. Charles W. Lloyd, Executive Secretary
Defense Acquisition Regulatory Council
ODASP (P) DARs, c/o OASD (P&L) (MRS)
DAR CASE 87-303
The Pentagon
Washington, DC 20301-3062

Dear Mr. Lloyd,

Racal-Dana is commenting on Rights in Technical Data interim rule effective April 2, 1988.

We wish to point out that we have particular concerns with regard to protecting our proprietary data developed at private expense.

We have reviewed the proposed changes endorsed by Proprietary Industries Association (PIA) and agree that these changes are important to encourage innovation at private expense. We urge you to evaluate carefully these proposed alterations to the language published and incorporate these safeguards to protect private enterprise (the technology backbone in America).

Sincerely,

Carol Steinke
Contracts Manager

sj

COGR

an organization of research universities

COUNCIL ON GOVERNMENTAL RELATIONS

One Dupont Circle, N.W., Suite 670
Washington, D.C. 20036
(202) 861-2595

EXBC. SOC
20 MAY 1988

May 11, 1988

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Mr. Charles W. Lloyd
Executive Secretary
ODASD(P)DARS
c/o OASD(PL)(MRS)
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Ref: DAR Case 87-303

Dear Mr. Lloyd:

The Council on Governmental Relations (COGR) wishes to submit the following comments with respect to the interim rule published at 53 FR 10780 under the DFARS Subpart 227.4 - Technical Data, Other Data, Computer Software, and Copyrights and the clause at 227.252-7013.

The Council on Governmental Relations represents over 125 colleges and universities engaged in a broad range of research supported by federal and private sponsors. These institutions conduct a variety of programs involving the transfer of technology and have been vitally interested in Federal policy on intellectual property for many years.

Our position with respect to data rights on federally funded research is summarized below, followed by our recommended revisions to the interim rule.

UNIVERSITY POSITION

Public Law 96-517, as amended, by giving nonprofit organizations and small businesses the right to own and commercialize patentable inventions resulting from federally funded research grants and contracts, has facilitated stronger research relationships and technology transfer between universities and industry.

University technology, however, involves not only patentable inventions but technical data and software. The absence of a federal policy for technical data and software which parallels that for patentable inventions is a substantial disincentive blocking the effective commercialization of many technologies by U.S. industry.

The COGR position was presented in testimony presented on April 30, 1987, before the House Subcommittee on Science,

Research and Technology. That testimony strongly endorsed Section 1(b)(6) of the April 10, 1987, Executive Order, "Facilitating Technology Transfer" and is included as Attachment 1.

COGR COMMENTS ON INTERIM RULE

Our comments on the interim rule and recommendations for revision are set forth below and amplified in Attachment 2, General Comments.

Recommendations 1 through 8 would revise the regulations and the applicable contract clause in a manner intended to ensure that the rights acquired by the government from all contractors are adequate to meet essential Government purposes but not so broad as to inhibit the transfer of the technology or discourage industrial companies from investing in its further development and commercialization.

Recommendation 9 is an alternative directed solely at nonprofit contractors. Although we view it as preferable from a university standpoint, it is submitted as an alternative and not as a sole recommendation, in as much as we believe the effective transfer of technology to enhance U.S. competitiveness depends on adopting the same underlying principles for all R&D contractors including industrial organizations and federal laboratories, as we are recommending for universities and other nonprofit institutions.

A. GENERAL ACQUISITION POLICY

The acquisition policy set forth in Part 227.472-1 of the interim rule implies that only the government itself can fulfill its obligations with respect to the dissemination of research results. COGR recommends two changes to recognize the traditional and increasingly active role of universities in disseminating the results of Federally funded research.

Recommendations 1 and 2

Under 227.472-1(b) - Add the following sentence:

"Universities and other nonprofit organizations, on the other hand, play an important role in disseminating the results of fundamental research to the industrial sector and government policy should not inhibit that transfer."

Under 227.472-1(c) - Add the underlined phrase so that the second sentence reads as follows:

"When the Government pays for research and development, it has an obligation to foster technological progress through wide dissemination of the information by the Government or through technology transfer programs conducted by the contractor and, where practicable, to provide competitive opportunities for other interested parties."

B. IMPACT OF UNLIMITED GOVERNMENT RIGHTS

Under the interim rule, the government acquires unlimited rights to technical data and to computer software generated in the course of a contract whether or not it pertains to parts, components or processes needed for reprourement; whether or not the government has a need for it; and whether or not it has been specified for delivery.

As set forth in Attachment 2, General Comments, this creates major difficulties for the universities by discouraging collaboration with industry and by requiring the almost impossible task of identifying and segregating technical data and computer software attributable to a specific time period on a research program which has been generating data and software cumulatively over a much longer period. The existence of unlimited rights in the government, whether or not exercised, seriously inhibits the contractor's ability to effectively transfer technical data and software to the commercial sector.

These views are substantially the same as those expressed by Federal laboratory personnel in the GAO study "Technology Transfer - Constraints Perceived by Federal Laboratories and Agency Officials" (GAO/RCED-88-116BR), which was issued in March 1988. An excerpt from that report is included in Attachment 2.

COGR believes that any rights which the government obtains in technical data and computer software should be limited to data for which the government has a need which cannot be met by other means or which is specifically required to be delivered under the terms of the contract. We propose the following:

Recommendations 3, 4, 5

3. Minimum government needs. Under 227.472-2, add the following:

"Where the technical data or computer software results from research and development contracts and does not pertain to items, components or processes to be competitively acquired or needed for repair, overhaul or replacement, DOD will encourage dissemination and commercialization by the contractor."

4. Technical data. In the clause at 252.227-7013 under (b)(1), Unlimited Rights, (and in the text at 227.472-3 (a)(1)), revise (i) and (ii) to add the underlined language:

"(i) Technical data pertaining to an item, component, or process which has been or will be developed exclusively with Government funds provided the contracting officer has identified a specific need for the data and that need cannot be met through other means.

"(ii) Technical data resulting directly from performance of experimental, developmental, or research work where delivery of such data was specified as an element of performance under a Government contract or subcontract."

5. Computer software. In the clause at 252.227-7013, under (c)(2), Unlimited Rights, revise (i) and (ii) by adding the underlined language:

"(i) Computer software resulting directly from performance of experimental, developmental or research work where delivery of such software was specified as an element of performance in this or any other Government contract or subcontract.

"(ii) Computer software required to be originated or developed under a Government contract, or generated as a necessary part of performing a contract, where delivery of such software is specified as an element of performance."

C. GOVERNMENT PURPOSE LICENSE RIGHTS IN TECHNICAL DATA

Subparagraph 227.472-3(a)(2) of the interim rule provides an exception to unlimited Government rights under which the Government may agree to accept Government purpose license rights "To encourage commercial utilization of technologies developed under Government contracts..."

However, (2)(ii) provides that "the contracting officer should not agree to accept GPLR when -

"(A) Technical data are likely to be used for competitive procurement involving large numbers of potential competitors, for items such as spares; and

"(B) Technical data must be published (e.g., to disclose the results of research and development efforts."

This pairing of competitive procurement and the dissemination of research results as functions for which commercial utilization will not be encouraged is both inexplicable and alarming to the universities. It can easily be interpreted as a specific constraint on the ability of universities to transfer technology generated in the course of basic and applied research programs, which appears diametrically opposed to the President's Executive Order 12591 and emerging Federal policy.

Recommendation 6

We recommend that 227.472-3(a)(2)(ii)(B) be omitted and a new section, added:

"(iii) When the government does not require immediate use of the data for competition and the contractor is a university or other nonprofit organization which has an interest in commercializing the data, the contracting officer will accept Government Purpose License Rights, which will expire after a specified period of time."

D. GOVERNMENT ACQUISITION OF RESTRICTED RIGHTS IN COMPUTER SOFTWARE

As noted by Federal laboratory officials in the GAO study cited in Attachment 2, General Comments, the effective dissemination of software by those who created it requires the same policies as governs patents. Unlimited government rights have inhibited dissemination and commercialization.

Software generated in the performance of university research, like that created in the Federal laboratories, is normally in a state of continuing development and enhancement that cannot be frozen at a point in time or neatly attributed to specific authors or funding. Its successful dissemination and commercialization frequently requires the continuing involvement of the original authors who created and understand its architecture and the intricacies of its source code. If an institution has established a program for the dissemination of computer software, that institution should be free to pursue it.

Recommendation 7

With respect to computer software, in the clause at 252.227-7013, revise (c)(1) Restricted Rights by adding a new subparagraph (iii) which would parallel the proposed new subparagraph (iii) under GPLR above:

"(iii) In cases where the Government would otherwise be entitled to unlimited rights, unless the Contracting Officer determines during the identification of needs process that unlimited rights are required for the purposes of competitive procurement of supplies or services, the contracting officer shall agree to accept restricted rights when the contractor is a small business or nonprofit organization which agrees to commercialize the technology."

E. NEGOTIATION FACTORS

As elaborated in Attachment 2, General Comments, it is quite likely that technical data and computer software generated in the performance of university research will be the cumulative result of continuing research conducted over a period of time with multiple sources of funding and may involve the participation of students and others whose effort is supported by university funds or other support. It is, therefore, quite likely that university research will frequently involve mixed funding.

Consequently, it is desirable that some norm be established to guide the negotiation of government-university rights in technical data and computer software.

Under 227.473-1(b)(2) a series of negotiation factors and negotiation situations are provided as guidance for the contracting officer when negotiating rights in technical data developed with mixed funding or when the Government negotiates to relinquish rights or to acquire greater rights.

COGR believes it is essential that guidance be added for situations involving technical data generated in the course of research conducted by universities and other nonprofit organizations.

Recommendation 8

Add the following new subparagraph to (b)(2)(ii):

"(D) When the government does not have a need to use the data for competition and the contractor is a university or other nonprofit which is interested in commercializing the data, the government will negotiate Government Purpose License Rights which will expire if the contractor fails to make reasonable efforts to pursue commercialization."

F. AN ALTERNATIVE RECOMMENDATION - ADOPT ALTERNATE II

Technical data and computer software generated in the course of university research rarely involves the competitive procurement of items, components, parts, and processes. Consequently, data regulations focused primarily on competitive procurement are particularly inappropriate for university research. Modifying those regulations so that they do not inhibit the transfer of technology between universities and the commercial sector is exceedingly difficult.

The applicable clause, 252.227-7013, does contain, in Alternate II, provisions that would be significantly more appropriate and workable for university research than those addressed above. Part 227.479 Small Business Innovative Research Program (SBIR Program), in response to Public Law 97-219, requires in subparagraph (d) that the clause at 252.227-7013, with its Alternate II, shall be included in all contracts awarded under the SBIR Program which require delivery of technical data or computer software.

Alternate II provides two paragraphs as substitutes for (b) and (c) of 252.227-7013, which are substantially more appropriate for the universities, and perhaps for other nonprofits and for small business not presently under the SBIR Program.

The following recommendation is, therefore, provided as an alternative to recommendations 4 through 8, set forth in B through E above:

Recommendation 9

Establish a new section 227.483 providing colleges and universities with rights in technical data and computer software comparable to those provided in Section 227.479 for the SBIR Program; or modify Section 227.479 by revising the title to read "Small Business Innovative Research Program (SBIR Program) and University Research Programs"

Add the following new paragraph (e):

"(e) The clause at 252.227-7013, Rights in Technical Data and Computer Software, with its Alternate II, shall be included in all

contracts awarded to colleges and universities for the conduct of basic or applied research, which do not require the delivery of technical data or computer software needed by the Government for the competitive procurement of items, components, or processes."

In Section 227.471, Definitions, modify the definition of Government Purpose License Rights to read in part:

"and in the SBIR Program and for colleges and universities, computer software..."

We appreciate the opportunity to comment.

Sincerely,

A handwritten signature in cursive script that reads "Milton Goldberg". The signature is written in dark ink and is positioned above the printed name.

Milton Goldberg

Attachments

Attachment 1 - TESTIMONY

COMMITTEE ON SCIENCE, SPACE AND TECHNOLOGY
SUBCOMMITTEE ON SCIENCE, RESEARCH AND TECHNOLOGY
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

FACILITATING ACCESS TO SCIENCE AND TECHNOLOGY
BY

GEORGE H. DUMMER
DIRECTOR, SPONSORED PROGRAMS
MASSACHUSETTS INSTITUTE OF TECHNOLOGY

ON BEHALF OF THE COUNCIL ON GOVERNMENTAL RELATIONS

APRIL 30, 1987

My name is George Dummer and I am the Director of the Office of Sponsored Programs at the Massachusetts Institute of Technology. With me is Mr. John Preston, Director of the MIT Technology Licensing Office.

I am speaking today on behalf of the Council on Governmental Relations, an organization of more than 120 colleges and universities engaged in a broad spectrum of federally and privately funded research programs.

The Chairman has invited my comments with respect to the President's Executive Order of April 10, 1987, entitled "Facilitating Access to Science and Technology," and to particulars and/or general issues which it addresses.

I would like to respond by focusing on one very important particular, namely, Section 1(b)(6), which provides for "the development of a uniform policy permitting Federal contractors to retain rights to software, engineering drawings, and other technical data generated by Federal grants and contracts, in exchange for royalty-free use by or on behalf of the government."

Contractor Ownership of Technical Data and Software

We strongly endorse the development of such a policy. Without it, the contribution which the government-university-industry relationship makes to this country's competitiveness will not achieve its full potential.

Government funding of university research provides a rapidly growing pool of research results with the potential for early industrial application, particularly as new technologies are created directly out of basic research, such as laser, optic fibers, integrated circuits, and the biotechnologies.

Earlier this morning, Dr. Graham mentioned recent breakthroughs in superconductivity. We are all aware, for example, that superconductivity has been achieved at -238 F. by Professor Chu's team at the University of Houston.

Suddenly, superconducting materials hold promise of making it economical to create tiny, superfast computers, magnetically floating trains, and long distance power lines that waste no energy.

Scientists around the world are reportedly eating and sleeping in their laboratories as they try to vault into the lead in the application and commercialization of superconductivity in a new and exploding market.

In this fast moving environment, we must continually ask ourselves what is necessary for the rapid and successful transfer and commercialization of this and other technologies which are created out of university research funded by the Federal government.

There are many answers because they are many elements which are essential to the transfer process. One of them, however, is a government policy which provides at the outset, not through the waiver process, that -

The ownership and the right to disseminate the research result and transfer the technology remain in the university which created it, and

The rights acquired by the government are adequate to meet essential government purposes, but not so broad as to inhibit the transfer of the technology or discourage industrial companies from investing in its further development and commercialization.

And the government has, at least in part, had such a policy since 1980, when P.L. 96-517 gave nonprofit organizations and small businesses the right to own and to commercialize patentable inventions resulting from Federally funded research grants and contracts.

Impact of P.L. 96-517

In my view, P.L. 96-517 and the amendments of P.L. 98-620, have had a significant and positive impact, starting with the elimination of some 26 different Federal patent policies, many of them involving the cumbersome waiver procedures which large business contractors find so troublesome today.

In addition, P.L. 96-517 has facilitated stronger research relationships between universities and industry. It has also encouraged the creation or expansion of university activities directed toward the transfer of university generated technology.

The MIT Technology Licensing Office which Mr. Preston directs is typical of the kind of activity in which a growing number of universities are engaged. It involves the transfer of technology by individuals with technical backgrounds and business experience who understand both the technology and the complications of transferring it to the commercial sector.

Dealing with Multiple Intellectual Property Rights

As universities have become more active in technology transfer, however, it has become increasingly obvious that the effective transfer of university generated technology requires dealing with a combination of intellectual property rights.

For example, a number of universities, including MIT, are working on nuclear magnetic resonance (NMR) imaging devices because, unlike x-rays used in CAT scans, magnetic fields have no known toxic side effects. But to achieve the accuracy of CAT scanned images requires a sophisticated and integrated hardware and software system.

Another example is symbolic processing, the backbone of artificial intelligence technology. Developed at MIT, it consists again of a combined hardware and software system which allows computers to simulate human problem solving and data processing techniques. The hardware design and its software, LISP, have been licensed by MIT to various companies, and LISP circuits are finding their way into many new applications.

Finally, one of the best examples of technology embodying multiple intellectual property rights is an integrated circuit, which may involve a copyrightable pattern-generating software program, a chip design copyright under the Semiconductor Chip Protection Act of 1984, a patent on the novel functions performed by the integrated circuit, and very possibly a trademark.

The consequence is that the effective transfer of university generated technology involving a combination of intellectual property rights requires a Federal policy for technical data and software which parallels that for patentable inventions. Such a policy would permit the transfer of that technology in a coherent manner without regard to the forms of legal protection involved.

Such a policy would also recognize that technical data, and software in particular, are most effectively transferred by the authors and creators. Software is normally in a state of continuing development and enhancement, and its successful dissemination and commercialization frequently requires the continuing involvement of the original authors who created and understand its architecture and the intricacies of its source code.

The Inconsistency of Current Federal Policies

However, as elaborated in my prepared statement, current Federal policies with respect to technical data and software are not consistent with federal policy governing rights in patents.

Furthermore, Federal rights in technical data and software are determined on the basis of criteria which are exceedingly difficult to apply, given the nature of university research.

And current Federal agency regulations inhibit the conduct of university research and the dissemination of the results, particularly those regulations which reflect the view that it is the prerogative of Federal sponsors to disseminate through their own distribution programs the technology created by their contractors.

Recommendation

We, therefore, endorse Section 1(b)(6) of the April 10 Executive Order and recommend that any uniform Federal policy provide that:

- The ownership of software and other technical data remain in the contractor;

- Any rights which the government obtains to technical data or software be limited to rights in data specifically required to be delivered or prepared under the terms of the contract or grant; and
- The Government acquire a royalty free license to use such technical data or software for specific government purposes, but not including the right to use it in a manner which might inhibit the transfer and commercialization of the technology by the university which created it or by the university's licensees.

RECEIVED

APR 29 A11:27

COMMITTEE ON SCIENCE, SPACE, AND TECHNOLOGY
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

0001

SUBCOMMITTEE ON SCIENCE, RESEARCH AND TECHNOLOGY
HEARINGS ON THE ROLE OF SCIENCE AND TECHNOLOGY IN COMPETITIVENESS

April 30, 1987 - 9:30 - 1:00
2318 Rayburn House Office Building

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Joe Kazmarek
Impact Technology, Inc.
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Attachment 2 - GENERAL COMMENTS

1. GOVERNMENT ACQUISITION OF UNLIMITED RIGHTS TO ALL DATA GENERATED

The Government's acquisition of unlimited rights to technical data and computer software under 227.472-7013, which extends to everything generated, originated, developed, etc., in the course of a contract, is so broad that it creates a number of serious difficulties for universities and for other organizations performing Government research contracts.

Discouraging University-Industry Interactions

Prior to the passage of Public Law 96-517, many industrial companies were reluctant to support university research in areas of concurrent federal support. There were a variety of federal policies with respect to rights in inventions and no assurance in many that the university would be permitted to retain title and to license the industrial sponsor on an acceptable basis. Where rights could only be acquired by a time-consuming waiver process, there was no certainty of success. After the passage of P. L. 96-517, when the universities were in a position to retain title to inventions resulting from Federal projects and license them on reasonable and predictable terms, industrial companies showed significantly more enthusiasm for funding research in areas of Federal interest and acquiring license rights and reduce to practice those inventions which were conceived with Federal research funding.

The same situation exists today with respect to computer software and other technical data as existed for patentable inventions prior to 1980. Industrial companies are reluctant to fund the development of software at universities when a Federal agency acquires unlimited rights in all software developed, whether or not the government has a need for it, and is in a position to make that software available to all comers without restriction.

These views are substantially the same as those expressed by Federal laboratory officials as reported in the GAO study "Technology Transfer - Constraints Perceived by Federal Laboratories and Agency Officials" (GAO/RCED-88-116BR), which was issued in March 1988. As summarized in the transmittal letter (B-207939) to that report, the findings dealing with computer software are as follows:

"In summary, the federal laboratory and agency officials we interviewed support the thrust of legislation and executive actions during the past 10 years to improve the link between the federal laboratories' technology base and U.S. business. These laws authorize federal laboratories to patent and exclusively license inventions and collaborate with businesses on research and development. Many of these officials stated, however, that the four identified constraints need to be addressed to further improve the effectiveness of their laboratories' technology transfer efforts. They believe that removing or reducing these constraints would (1) provide more incentives to transfer computer software technology to U.S. businesses, (2) encourage U.S. businesses to make better use of federal laboratory resources, and

(3) reduce administrative burdens and time delays for interactions. The following paragraphs elaborate on each of the four perceived constraints.

"Officials at 7 of the 10 federal laboratories and 5 of the 6 federal agencies stated that technology transfer is constrained by legislation that requires federal agencies to publicly disseminate computer software. They noted that although the Patent and Trademark Amendments of 1980, as amended, authorize federal agencies to patent and exclusively license inventions and permit most contractor-operated federal laboratories to elect to retain title to inventions that they make, the act does not address computer software, which is considered technical data and normally cannot be patented. The officials propose that federal law be amended so that the transfer of computer software would be treated similarly to federal inventions because (1) no apparent reason exists for treating federal laboratory inventions and computer software differently, (2) as with inventions, the most effective way to transfer computer software in many cases is to copyright and exclusively license it to a software company, (3) federal employees who develop computer software do not have the same incentives to commercialize it as those who make inventions because they cannot share in royalty income, and (4) most federal programs to publicly disseminate computer software provide foreign business competitors equal access to the software."

The remaining three perceived constraints relate to limitations on the authority to conduct proprietary research, delays in obtaining waivers of DOE's title rights to inventions, and concern that industry interest may be inhibited by burdensome procedures for entering cooperative agreements.

Identifying Data Generated in Performing Contracts

It is a formidable task to identify "all data or computer software 'produced' or 'generated' or 'developed' in the performance of basic and applied research, particularly when it is not related to specific items, components or processes and is not specified in the contract for delivery.

In performing research, including that funded by third parties, the faculty members and their research teams follow their own long term professional and scholarly interests and agendas. The research, therefore, tends to be a continuum which builds a base of experimental results and data which, over the years, is expanded, refined, and perhaps integrated with other research results in an interdisciplinary environment.

The research team is not assembled to conduct a sponsor-initiated project and disbanded or reconstituted for the next assignment when that one is completed. It is usually already in place, pursuing its own agenda. What it agrees to do in accepting federal or private research funding is to devote some portion of its total effort, for a stated period of time, to applying its cumulative experience and expertise to a particular problem or application which is of interest to the sponsor and gives the university

research team an opportunity to advance the state of the art. Consequently, the data and software which it generates is the cumulative results of a continuing program which cannot be frozen in time.

FCCSET Policy Statement

In sharp contrast to the policy reflected in the interim rule, a government-wide data policy statement developed (but never issued) by a subcommittee of the Federal Coordinating Council for Science, Engineering and Technology (FCCSET) contained the following statement in its February 1985 revision. Although the subcommittee was disbanded before issuing a final policy statement, the language is particularly realistic from a university standpoint:

"...It must also be recognized that in many cases the data will build upon past experience, expertise, know-how and organizational abilities which the contractor or subcontractor brings to the project. As a practical matter, it is not likely that a meaningful segregation can be made between the know-how and expertise generated under the contract and the know-how and expertise which the contractor previously possessed and applied to the contract."

" Any rights which the government obtains to technical data will be limited to rights in data specifically required to be delivered or prepared under the terms of the work statement, reporting requirements, or specifications of the contract or grant. Broad and sweeping terminology giving the government rights in 'all data first produced or generated in the course of or under this contract' or 'in all data generated under this contract whether or not delivered' should be avoided."

This, of course, is particularly true of software, which is constantly being developed, refined, debugged, enhanced, used for derivative works, and issued and reissued in successive releases.

UNIVERSITY OF WASHINGTON
SEATTLE, WASHINGTON 98195

The Graduate School
201 Administration Building AG-10
Telephone: (206) 543-5900

May 17, 1988

Mr. Charles W. Lloyd, Executive Secretary
ODASD(P)DARS, c/o OASD(PL)(MRS)
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Ref: DAR Case 87-303

Dear Mr. Lloyd:

This letter contains our comments on the interim rule published at 53FR 10780 under the DFARS Subpart 227.4 - Technical Data, Other Data, Computer Software, and Copyrights and the clause at 227.252-7013.

We received over \$200 million in Federal research funding last year and have a very ambitious technology transfer program. Thus, we are vitally interested in Federal policy relating to intellectual property. Unless amended, the proposed rule will thwart realization of the goals inherent in Federal policy stated in Public Law (PL) 96-517.

It is clear that PL 96-517, as amended by PL 98-620 has facilitated stronger research relationships and technology transfer linkages between universities and industry. The proposed rule must be modified to recognize that university technology involves not only patentable inventions but technical data and software, which is usually covered by other forms of legal protection. The effective transfer of university technology to the marketplace requires a Federal policy for technical data and software which parallels that for patentable inventions. Only through such symmetry of Federal policies can we achieve the results intended in the April 10, 1987 Executive Order, "Facilitating Technology Transfer."

Suggested changes in the proposed rule are presented in Attachment A. We appreciate this opportunity to comment.

Sincerely,



Donald R. Baldwin
Assistant Provost for Research
and
Director of Technology Transfer

Attachment

Attachment A

1. Under 227.472-1(b), add the following:

It is recognized that universities and other non-profit organizations play an important role in disseminating the results of fundamental research to the industrial sector and Government policy should facilitate that transfer.

2. Under 227.472-1(c), add the underlined phrase so that the second sentence reads as follows:

When the Government pays for research and development, it has an obligation to foster technological progress through wide dissemination of the information by the Government or through technology transfer programs conducted by contractors and, where practicable, to provide competitive opportunities for other interested parties.

3. Under 227.472-2, add the following:

The Government will acquire technical data or computer software resulting from research and development contracts only where it pertains to items, components, or processes to be competitively acquired or when such data or software is not normally disseminated and commercialized by the contractor.

4. In the clause at 252.227-7013, under (b)(1), Unlimited Rights, and in the text at 227.472-3(a)(1), revise (i) and (ii) to add the underlined language:

(i) Technical data pertaining to an item, component, or process which has been or will be developed exclusively with Government funds provided the contracting officer has identified a specific need for the data and that need cannot be met through other means.

(ii) Technical data resulting directly from performance of experimental, developmental, or research work where delivery of such data was specified as an element of performance under a Government contract or subcontract.

5. In the clause at 252.227-7013, under (c)(2), Unlimited Rights, revise (i) and (ii) by adding the underlined language:

(i) Computer software resulting directly from performance of experimental, developmental or research work where delivery of such software was specified as an element of performance in this or any other Government contract or subcontract.

(ii) Computer software required to be originated or developed under a Government contract, or generated as a necessary part of performing a contract, where delivery of such software is specified as an element of performance.

6. Subparagraph 227.472-3(a)(2) of the interim rule provides an exception to unlimited Government rights under which the Government may agree to accept Government purpose license rights "To encourage commercial utilization of technologies developed under Government contracts..."

However, (2)(ii) provides that "the contracting officer should not agree to accept GPLR when -

"(A) Technical data are likely to be used for competitive procurement involving large numbers of potential competitors, for such items such as spares; and

(B) Technical data must be published (e.g., to disclose the results of research and development efforts."

This pairing of competitive procurement and the dissemination of research results as functions for which commercial utilization will not be encouraged is alarming. It can be interpreted as a constraint on the ability of universities to transfer technology generated in the course of basic and applied research programs. That is contrary to existing and emerging Federal policy so the current language apparently doesn't come out as intended.

7. Under 227.472-3, omit (a)(2)(ii)(B) and add a new section as follows:

(iii) When the Government does not require immediate use of the data for competition and the contractor is a university or other nonprofit organization which has an interest in commercializing the data, the contracting officer will accept Government Purpose License Rights, which will expire after a specified period of time.

8. In the clause at 252.227-7013, revise (c)(1) Restricted Rights by adding a new subparagraph (iii) which would parallel the proposed new subparagraph (iii) under GPLR above:

(iii) In cases where the Government would otherwise be entitled to unlimited rights, unless the contracting officer determines during the identification of needs process that unlimited rights are required for the purposes of competitive procurement of supplies or services, the contracting officer shall agree to accept restricted rights when the contractor is a small business or non-profit organization which agrees to commercialize the technology.

9. Under 227.473-1(b)(2)(ii), add a new subparagraph as follows:

(D) When the Government does not have a need to use the data for competition and the contractor is a university or other nonprofit organization which is interested in commercializing the data, the Government will negotiate Government Purpose License Rights which will expire if the contractor fails to make reasonable efforts to pursue commercialization.



**GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE**
Washington, D.C. 20230

MAY 17 1988

87-303

Honorable Kathleen A. Buck
General Counsel
Department of Defense
The Pentagon - Room 3E980
Washington, D.C. 20301-1600

Dear Kathy:

We have reviewed the interim regulation entitled "Department of Defense Acquisition Regulation Supplement: Patents, Data, and Copyrights" (DAR Case 87-303) published in the Federal Register on April 1, 1988. There are several problem areas in the regulation. First, the regulation does not comply with the policy set out in Section 1(b)(6) of Executive Order 12591 which would allow Federal contractors to retain rights to software, engineering drawings, and other technical data in exchange for royalty-free use by or on behalf of the government. It is our view that the Secretary of Defense should exercise the authority provided for in Public Law 99-661, Section 953(a) to provide for the retention of rights in technical data by contractors whether the item or process was developed entirely or partially with Federal funds.

Second, we believe that the drafters of the regulation have not fully considered the statement of congressional policy set forth in section 200 of title 35, in that both small business firms and nonprofit organization are not given any special consideration in this complex and burdensome regulation.

A third comment on the regulation is the provision 252.227-7034. Patents-subcontracts. Why is a patent provision included in the middle of a section on a data regulation? Like the FAR Part 27, the data and patents provisions should be in separate subparts to avoid the likelihood of being overlooked.

It is our recommendation that the regulation be rewritten to comply with Executive Order 12591. This can be done by allowing contractors, to retain rights in technical data and computer

software whether developed entirely or in part with Federal funds in exchange for a Government purpose license right in the data and a restricted right in computer software.

Finally, the complex record keeping and extensive paperwork requirements the regulation imposes on all contractors are unduly burdensome and should be simplified.

Sincerely,



Robert H. Brumley
General Counsel

cc: Honorable Robert B. Costello
Charles W. Lloyd
Barry C. Beringer



INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202

Audit Policy
and Oversight


MAY 13 1988

MEMORANDUM FOR EXECUTIVE SECRETARY, DEFENSE ACQUISITION
REGULATORY COUNCIL

SUBJECT: Defense Acquisition Regulation Case 87-303,
Revision to Subpart 227.4 and Part 252 of the Defense
Federal Acquisition Regulation Supplement to
Implement Section 808 of the National Defense
Authorization Act for Fiscal Years 1988 and 1989

We have reviewed the proposed revisions to Subpart 227.4
and Part 252 under the subject Defense Acquisition Regulation
Case.

We concur with the proposed revisions. The policies,
procedures, and contract clauses in the interim rule should
ensure that the DoD obtains the rights to technical data when
DoD funds the development of an item. Also, the concept of
Government-purpose license rights appears to be a workable
compromise when an item is developed with both DoD and industry
funds.


James H. Curry
Assistant Inspector General
for Audit Policy and Oversight



ENERGY RESEARCH CORPORATION

3 GREAT PASTURE ROAD, DANBURY, CONNECTICUT 06813 203-792-1460

Telex 469470 • Facsimile (203) 798-2945

May 6, 1988

Defense Acquisition Regulatory Council
Attn: Mr. Charles W. Lloyd, Executive Secretary
ODASD (P) DARS
c/o OASD (P&L) (MRS)
Room 3D139
The Pentagon
Washington, DC 20301-3062

Reference: DAR Case 87-303
DAR Case 88-610

Dear Mr. Lloyd:

Energy Research Corporation is a Small Business specializing in advanced battery and fuel cell technology and development. ERC customers include DoD, DoE and commercial firms. Most of ERC's business consists of cost-type R & D contracts.

ERC has a great interest in the Interim Rule, 53FR10780, dated April 1, 1988, on Rights in Technical Data. ERC has several potential DoD contract awards which will be affected by changes to the Rights in Technical Data provisions. In addition, ERC presently licenses technology it has developed to several other firms, which creates a further financial interest on ERC's part.

The Interim Rule needs some clarifications, both in DFARS 27.472-1(b) and 27.473-2, with regards to Contractor rights to Technical Data. In addition to owning all rights to proprietary, independently developed data, what rights do contractors have to use the results of Government or mixed funded research for commercial purposes? Are there any restrictions on contractors independently entering into third party agreements for commercial use of Government or mixed funded research (besides military security)? Is it the intent of the regulations that the contractor has the right to earn license fees without Government impairment, involvement or participation?

ERC would welcome your clarifications on this subject.

Very truly yours,

Ross M. Levine
Ross M. Levine
Contract Administrator

RML/11

5/16/88
called
+ referred
him to
RICKS.
[Signature]

Litton

8000 Woodley Avenue
P.O. Box 7601
Van Nuys, California
91409-7601
Cable Address LITNDATSYS
Telex 662-643
818 902-5125

May 5, 1988

Donald J. Ellingsberg
Group Patent and
Licensing Counsel

Defense Acquisition Regulatory Council
Attention: Mr. Charles W. Lloyd
Executive Secretary
ODASD(P) DARS
c/o OUSD(A) (M&RS)
The Pentagon, Room 3D139
Washington, DC 20301

Dear Mr. Lloyd:

The Department of Defense Interim Rule that implements Section 808, Rights in Technical Data, of Public Law 100-180, which issued April 1 and is effective for contracts resulting from solicitations issued on or after April 2, 1988, has been reviewed.

Litton, as a defense contractor, appreciates the opportunity to respond to the invitation for written comments to be considered in formulating the final rule.

We commend the DAR Council in its effort to implement Section 808 of Public Law 100-180, and find the interim rule to be generally acceptable. However, there are eight (8) areas within the interim rule that deserve comment and favorable consideration to implement Litton's suggested corrective action for each area.

1. Section 227.471 and Clause 252.227-7013(a)

The use of the phrase "as an element of performance" in conjunction with a development required or not required under a Government contract or subcontract is troublesome. It is possible that a contractor could develop an item, component, process or computer software at its private expense, find it to be useful in satisfaction of a contractually required development, and then have such development considered to be "an element of performance" under the contract, thereby losing the "limited" or "restricted" rights that normally would pertain to such private expense development. Therefore, it is recommended that "an element of performance" be deleted in each instance from each of the new "Developed Exclusively" definitions.

In the definition "Developed Exclusively at Private Expense", the third sentence should be deleted in its entirety. "All indirect costs of development" is too overreaching, and is considered to be onerous in view of the stated policy as to the balancing of interests between the Government and the contractor.

2. Section 227.472

There is need for a clearly stated acquisition policy for technical data. However, in view of the thrust of the interim rule to address both technical data and computer software, it is recommended that this Section (and elsewhere throughout the interim rule as appropriate) recite "computer software". (Please see the attached mark-up of the interim rule.)

3. Section 227.473-1 (iii)(B) and (B)(2)

The concept and implementation of Government purpose license rights (GPLR) has been well received. It would appear, however, that time limitations for the GPLR (or limited rights) should not be less than the stated "one year", but could often be desirable for a period greater than "five years" where an item, component, process or computer software has a commercial market potential that very often extends longer than five years. Therefore, it is recommended that all references to capping this time limitation to five years be expressly deleted, and that such longer periods of greater than five (5) years be subjected to the indicated approval by the chief of the contracting office.

4. Standard Non-disclosure Agreement of Section 227.473-1

Since this Agreement may find use in an SBIR Program, it is recommended that the request for technical data be amended to include a similar request, under an SBIR Program, for computer software.

In (4), it is recommended that the agreement not to use the GPLR data (or computer software) for commercial purposes be further restricted as "including the use of such data as resource information in the independent development of related items, components, processes, or computer software for commercial purposes."

This is intended to further emphasize the restriction on use of the GPLR data, and also to clarify by a clear statement the prohibitive use of the data.

5. Section 227.473-3 (b)

It is agreed that the use of a withhold is one method to encourage a contractor to establish, maintain and follow adequate marking procedures where, in the opinion of the contract administrator, such contractor has failed to satisfy the marking requirements of 252.227-7018 and -7039. However, it is recommended that the contract administrator first notify the contractor of any such failure. "The contracting officers notification shall provide that, if after receiving the notice, the contractor does not establish, maintain and follow adequate marking procedures, the contracting officer may insert a bilateral modification in the contract providing for the withhold of payments under the clause at 252.227-7030 for failure to satisfy the marking requirements of 252.227-7018 and 252.227-7029."

At (c)(3), it would appear reasonable for the Government to be relieved of liability "for its acts prior to the date of the contractor's request", but the Government should not be relieved of any liability after such notice.

6. Section 227.475-2 and Clause 252.227-7027

Since it can be expected that a contractor will have to expend a certain amount of time and effort to locate technical data or computer software subject to deferred ordering, it is recommended that such contractor should also be compensated for "locating" such data or software.

7. Section 227.481

TEXT IS MISSING! Should this be "(Reserved)"?

8. Clause 252.227-7038

Section 227.473-1(a)(4) referenced by this new clause directs the use of the certification of Clause 252.227-7028. This certification is considered to be adequate for the intend purposes. Therefore, this new clause should not be included in the final rule.

Mr. Charles W. Lloyd
May 5, 1988
Page four

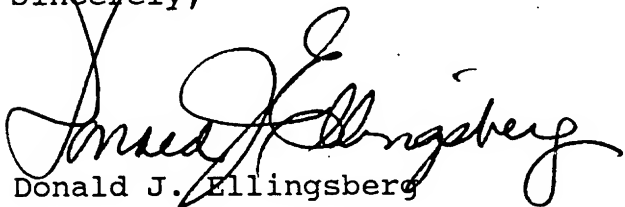
Further, this new clause is considered to be objectionable in view of clause 252.227-7037. The "validation" procedures of -7037 are considered to be adequate for a determination as to whether technical data or computer software was developed in whole, or in part, at private expense.

The attached mark up of the interim rule also includes other suggested amendments as to form or substance. They would appear to be self-explanatory, and are provided for your consideration and possible use.

On behalf of Litton, I wish to express my appreciation for your professional attention to this letter and its contents, and for this opportunity to respond to your invitation for comments.

If I can provide further assistance in this matter, or can answer any questions you may have concerning this letter, please let me know.

Sincerely,



Donald J. Ellingsberg

:sf

c: C. S. Haughey, Esq.
H. W. Patterson, Esq.
W. J. Powers, Jr., Esq.
E. H. Schiff
W. R. Thiel, Esq.

DOD TECHNICAL DATA RIGHTS RULES

53 FR 10780

DEPARTMENT OF DEFENSE

48 CFR Parts 227 and 252

**Department of Defense Federal
Acquisition Regulation Supplement;
Patents, Data, and Copyrights**

AGENCY: Department of Defense (DoD).

ACTION: Interim rule and request for comments.

SUMMARY: The Defense Acquisition Regulatory (DAR) Council is issuing interim changes to Subpart 227.4 and

4-7-88

Part 252 of the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 808 of the National Defense Authorization Act for Fiscal Years 1988 and 1989 (Pub. L. 100-180).

DATE: April 2, 1988. The interim rule is effective for contracts resulting from solicitations issued on or after April 2, 1988. Comments received by May 31, 1988 in response to this Notice will be considered in formulating the final rule.

ADDRESS: Interested parties should submit written comments to: Defense

Acquisition Regulatory Council, ATTN: Mr. Charles W. Lloyd, Executive Secretary, ODASD(P)DARS, c/o OASD(P&L)(MRS), Room 3D139, The Pentagon, Washington, DC 20301-3062. Please cite DAR Case 87-303 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Mr. Charles W. Lloyd, Executive Secretary, DAR Council, (202) 697-7266.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule implements section

808, Rights in Technical Data, of Pub. L. 100-180 which requires the Department of Defense to make certain revisions to DFARS Subpart 227.4 and Part 252. The statute provides that:

1. The terms "exclusively with Government funds" and "exclusively at private expense" be defined and that the definitions specify how indirect costs are to be treated.

2. A contractor or subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition for award, to refrain from offering to use, or from using, an item or process developed exclusively at private expense and to which the contractor or subcontractor is entitled to restrict the Government's rights.

3. The regulation may not impair the right of a contractor or subcontractor to receive from a third party a fee or royalty for the use of technical data pertaining to an item or process developed exclusively at private expense.

4. A contractor or subcontractor may be permitted to license directly the use of technical data which the contractor is otherwise allowed to restrict, if necessary to develop alternative sources of supply and manufacture.

5. The respective rights of the Government and of the contractor or subcontractor in technical data pertaining to an item or process developed in part with Government funds and in part at private expense must be established on the basis of negotiation, except where a determination is made that negotiations would not be practicable. Reasonable and flexible guidelines can be prescribed for the conduct of the negotiations, including negotiation objectives.

In addition to the regulatory changes required by section 808 of Pub. L. 100-180, the interim rule was drafted in consideration of Executive Order 12591, entitled: Facilitating Access to Science and Technology, issued on April 10, 1987.

The interim rule also addresses two issues raised by public comments. When the final rule implementing section 953 of Pub. L. 99-500 was published on April 10, 1987 (52 FR 12391), the DAR Council indicated that commercialization and non-disclosure agreements required additional consideration.

1. **Commercialization.** This interim rule provides additional procedures and criteria whereby a contractor may be granted exclusive commercial rights in technical data, while considering the public interest in obtaining access to the data and the administrative burden to the Government in protecting the

contractor's exclusive commercial interests.

2. (a) **Standard Non-Disclosure Agreements.** The interim rule contains a standard agreement which must be executed by a prospective recipient of Government Purpose License Rights (GPLR) data prior to release of the data to the concern.

(b) **Alternative Approach to Non-Disclosure Agreements.** The DAR Council is considering, and specifically requests public comment with respect to, an alternative approach to the use of non-disclosure agreements where data subject to GPLR are involved. Under this alternative approach, a solicitation provision would notify offerors that the solicitation includes technical data subject to restrictions on further use or disclosure, and would require offerors to safeguard the data. It is envisioned that the solicitation provision, together with the restrictive legends placed on the technical data, would sufficiently protect the contractor retaining exclusive commercial rights, and would adequately notify recipients of the solicitation of their responsibility to safeguard the data.

Finally, the interim rule was developed based on direction from the Deputy Assistant Secretary of Defense (Procurement) that DFARS Subpart 27.4 be simplified and streamlined.

B. Regulatory Flexibility Act Information

The interim rule may have a significant economic impact upon a substantial number of small entities, within the meaning of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.* An Initial Regulatory Flexibility Analysis has therefore been deemed necessary and will be provided to the Chief Counsel for Advocacy of the U.S. Small Business Administration. Interested parties desiring to obtain a copy of the Analysis may contact the individual listed above. Comments received from the public concerning the Analysis will be considered in drafting a final rule and in performing a Final Regulatory Flexibility Analysis.

Comments from small entities concerning the affected DFARS subparts will also be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite DAR Case 88-810 in correspondence.

C. Paperwork Reduction Act Information

The interim rule contains information collection requirements within the

meaning of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* Accordingly, an information collection clearance request has been submitted to OMB pursuant to 5 CFR 1320.13. Public comments concerning that request will be invited by OMB through a subsequent Federal Register notice.

List of Subjects in 48 CFR Parts 227 and 252

Government procurement.

Charles W. Lloyd,

Executive Secretary, Defense Acquisition Regulatory Council.

Therefore, 48 CFR Parts 227 and 252 are amended as follows:

1. The authority citation for 48 CFR Parts 227 and 252 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DoD Directive 5000.35, and DoD FAR Supplement 201.301.

10781

PART 227—PATENTS, DATA, AND COPYRIGHTS

2. Subpart 227.4 is revised to read as follows.

Subpart 227.4—Technical Data, Other Data, Computer Software, and Copyrights

Sec.

227.470 Scope.

227.471 Definitions.

227.472 Acquisition policy for technical data and rights in technical data.

227.472-1 General.

227.472-2 Establishing minimum Government needs.

227.472-3 Rights in technical data.

227.473 General procedures.

227.473-1 Procedures for establishing rights in technical data.

227.473-2 Prohibitions.

227.473-3 Marking and identification requirements.

227.473-4 Validation of restrictive markings on technical data.

227.473-5 Remedies for noncomplying technical data.

227.473-6 [Reserved]

227.474 [Reserved]

227.475 Other procedures.

227.475-1 Data requirements.

227.475-2 Deferred delivery and deferred ordering.

227.475-3 Warranties of technical data.

227.475-4 Delivery of technical data to Foreign Governments.

227.475-5 Overseas contracts with Foreign Sources.

227.475-6 [Reserved]

227.475-7 [Reserved]

227.475-8 Publication for sale.

227.476 Special works.

227.477 Contracts for acquisition of existing works.

227.478 Architect-engineer and construction contracts.

- 227.478-1 General.
- 227.478-2 Acquisition and use of plans, specifications and drawings.
- 227.478-3 Contracts for construction supplies and research and development work.
- 227.478-4 [Reserved]
- 227.478-5 Approval of restricted designs.
- 227.479 Small business innovative research program (SBIR Program).
- 227.480 Copyrights.
- 227.481 Acquisition of rights in computer software.
- 227.482 [Reserved]

Subpart 227.4—Technical Data, Other Data, Computer Software, and Copyrights

227.470 Scope.

This subpart sets forth the Department of Defense policies and procedures relating to the acquisition of technical data and computer software as well as rights in technical data, other data, computer software, and copyrights. This part does not apply to rights in computer software acquired under GSA schedule contracts.

227.471 Definitions.

"Commercial computer software", as used in this subpart, means computer software which is used regularly for other than Government purposes and is sold, licensed, or leased in significant quantities to the general public at established market or catalog prices.

"Computer", as used in this subpart, means a data processing device capable of accepting data, performing prescribed operations on the data, and supplying the results of these operations; for example, a device that operates on discrete data by performing arithmetic and logic processes on the data, or a device that operates on analog data by performing physical processes on the data.

"Computer data base", as used in this subpart, means a collection of data in a form capable of being processed and operated on by a computer.

"Computer program", as used in this subpart, means a series of instructions or statements in a form acceptable to a computer, designed to cause the computer to execute an operation or operations. Computer programs include operating systems, assemblers, compilers, interpreters, data management systems, utility programs, sort-merge programs, and ADPE maintenance/diagnostic programs, as well as applications programs such as payroll, inventory control, and engineering analysis programs. Computer programs may be either machine-dependent or machine-independent, and may be general-purpose in nature or be designed to satisfy the requirements of a particular user.

"Computer software", as used in this subpart, means computer programs and computer data bases.

"Computer software documentation", as used in this subpart, means technical data, including computer listings and printouts, in human-readable form which (a) documents the design or details of computer software, (b) explains the capabilities of the software, or (c) provides operating instructions for using the software to obtain desired results from a computer.

"Data", as used in this subpart, means recorded information, regardless of form or method of the recording.

"Detailed design data", as used in this subpart, means technical data that describes the physical configuration and performance characteristics of an item or component in sufficient detail to ensure that an item or component produced in accordance with the technical data will be essentially identical to the original item or component.

"Detailed manufacturing or process data", as used in this subpart, means technical data that describes the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

"Developed", as used in this subpart, means that the item, component, or process exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered "developed", the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component or process be actually reduced to practice within the meaning of Title 35 of the United States Code.

"Developed Exclusively with Government Funds", as used in this subpart, means, in connection with an item, component, or process, that the cost of development was directly paid for in whole by the Government ~~or that the development was required as an element of performance under a~~ Government contract or subcontract.

"Developed Exclusively at Private Expense", as used in this subpart,

means, in connection with an item, component, or process, that no part of the cost of development was paid for by the Government and that the development was not required as an element of performance under a Government contract or subcontract. Independent research and development and bid and proposal costs, as defined in FAR 31.205-18 (whether or not included in a formal independent research and development program), are considered to be at private expense. ~~All indirect costs of development are considered Government-funded when development was required as an element of performance in a Government contract or subcontract.~~ Indirect costs are considered funded at private expense when development was not required as an element of performance under a Government contract or subcontract.

"Form, fit, and function data", as used in this subpart, means technical data

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that describes the required overall physical, functional, and performance characteristics, (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

"Government purpose license rights" (GPLR), as used in this subpart, means rights to use, duplicate, or disclose data (and in the SBIR Program, computer software), in whole or in part and in any manner, for Government purposes only, and to have or permit others to do so for Government purposes only. Government purposes include competitive procurement, but do not include the right to have or permit others to use technical data (and in the SBIR Program, computer software) for commercial purposes.

"Limited rights", as used in this subpart, means rights to use, duplicate, or disclose technical data, in whole or in part, by or for the Government, with the express limitation that such technical data shall not, without the written permission of the party asserting limited rights, be: Released or disclosed outside the Government; used by the Government for manufacture, or in the case of computer software documentation, for preparing the same or similar computer software; or used by a party other than the Government, except when:

(a) Release, disclosure, or use is necessary for emergency repair or overhaul; provided that the release, disclosure, or use outside the Government shall be made subject to a prohibition against further use, release.

or disclosure, and that the party asserting limited rights be notified by the contracting officer of such release, disclosure, or use; or

(h) Release or disclosure to a foreign government that is in the interest of the United States and is required for evaluational or informational purpose under the conditions of (a) above, except that the release or disclosure may not include detailed manufacturing or process data.

"Required as an Element of Performance Under a Government Contract or Subcontract", as used in this subpart, means, in connection with the development of an item, component, or process, that the development was specified in a Government contract or subcontract or that the development was necessary for performance of a Government contract or subcontract.

"Restricted rights", as used in this subpart, means rights that apply only to computer software, and include, as a minimum, the right to—

(a) Use computer software with the computer for which or with which it was acquired, including use at any Government installation to which the computer may be transferred by the Government;

(b) Use computer software with a backup computer if the computer for which or with which it was acquired is inoperative;

(c) Copy computer programs for safekeeping (archives) or backup purposes; and

(d) Modify computer software, or combine it with other software, subject to the provision that those portions of the derivative software incorporating restricted rights software are subject to the same restricted rights.

In addition, restricted rights include any other specific rights not inconsistent with the minimum rights in (a)-(d) above that are listed or described in a contract or described in a license agreement made a part of a contract.

"Technical data", as used in this subpart, means recorded information, regardless of the form or method of the recording of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

"Unlimited rights", as used in this subpart, means rights to use, duplicate, release, or disclose, technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so.

"Unpublished", as used in this

subpart, means that technical data or computer software has not been released to the public or furnished to others without restriction on further use or disclosure. Delivery of other than unlimited rights technical data or computer software to or for the Government under a contract does not, in itself, constitute release to the public.

227.472 Acquisition policy for Technical Data and rights in technical data 227.472-1 General.

The acquisition of technical data and the rights to use that data requires a balancing of competing interests.

(a) *The Government's Interests.* The Government has extensive needs for many kinds of technical data and the rights to use such data. Its needs may exceed those of private commercial customers. Millions of separate items must be acquired, operated and maintained for defense purposes.

Technical data are required for training of personnel, overhaul and repair, cataloging, standardization, inspection and quality control, packaging and logistics operations. Technical data resulting from research and development and production contracts must be disseminated to many different users. The Government must make its technical data widely available to increase competition, lower costs and provide for mobilization. Finally, the Government has an interest in encouraging contractors to develop new technologies and to improve existing technologies to satisfy Government and commercial needs. To encourage contractors and subcontractors to expend resources in developing applications of these technologies, it is may be appropriate to allow them to exclusively exploit the technology.

(b) *The Contractor's Interests.* Commercial and non-profit organizations have property rights and economic interests in technical data. Technical data are often closely held in the commercial sector because their disclosure to competitors could jeopardize the contractor's competitive advantage. Public disclosure can cause serious economic hardship to the originating company.

(c) *The Balancing of Interests.* (1) The Government's need for technical data and a contractor's economic interest in it do not necessarily coincide. However, they may coincide. This is true in the case of innovative contractors who can best be encouraged to develop items of military usefulness when their rights in such items are scrupulously protected.

(2) The Government needs to encourage delivery of data essential for

military needs, even though that data would not customarily be disclosed in commercial practice. When the Government pays for research and development, it has an obligation to foster technological progress through wide dissemination of the information and, where practicable, to provide competitive opportunities for other interested parties.

(3) Acquiring, maintaining, storing, retrieving, protecting and distributing technical data are costly and burdensome for the Government. Therefore, it is necessary to avoid acquisition of unnecessary technical data.

227.472-2 Establishing minimum Government needs in technical data and commercial software.
The Department of Defense shall obtain only the minimum essential technical data and data rights. In establishing the minimum Government needs, the following factors shall be 10783 and rights,

considered: Whether the item, component, or process will be competitively acquired; whether repair and overhaul work will be contracted out; whether the repair or replacement parts will be commercial items; or whether the item will be acquired by form, fit and function data, performance specifications, or by detailed design data. In deciding how to acquire data and data rights, the Department of Defense will use the least intrusive procedures in order to protect the contractor's economic interests (see Subpart 217.72).

227.472-3 Rights in technical data.

There are three basic types of rights which apply to technical data delivered under contract to the Government. These are unlimited rights, limited rights, and Government purpose license rights. The Government is entitled to unlimited rights in technical data as enumerated in (a)(1) below. The Government will obtain limited rights as discussed in (b)(1) below. Government purpose license rights may be established in accordance with (a)(2), (b)(2), or (c) below.

(a) *Unlimited Rights.* (1) The Government is entitled to and, except as provided in paragraph (a)(2), will receive unlimited rights in—

(i) Technical data pertaining to items, components, or processes which have been or will be developed exclusively with Government funds;

(ii) Technical data resulting directly from performance of experimental, developmental, or research work specified as an element of performance

under a Government contract or subcontract;

(iii) Form, fit, and function data pertaining to items, components, or processes prepared or required to be delivered under any Government contract or subcontract;

(iv) Manuals or instructional materials (other than detailed manufacturing or process data) prepared or required to be delivered under any Government contract or subcontract necessary for installation, operation, maintenance, or training purposes;

(v) Technical data prepared or required to be delivered under any Government contract or subcontract and constituting corrections or changes to Government-furnished data or computer software;

(vi) Technical data, which are otherwise publicly available, or have been released or disclosed by the contractor or subcontractor, without restriction on further release or disclosure;

(vii) Technical data in which the Government has obtained unlimited rights as a result of negotiations;

(viii) Technical data previously delivered subject to limited rights or Government purpose license rights which have expired; and

(ix) Technical data delivered under the contract which, at the time of delivery, are not identified in the listing described in paragraph (k) of the clause at 252.227-7013.

(2) *Exception to unlimited rights—Government purpose license rights.* (i) To encourage commercial utilization of technologies developed under Government contracts, the Government may agree to accept technical data subject to Government purpose license rights (GPLR). The Government shall retain the royalty-free right to use, duplicate, and disclose data for Government purposes only and to permit others to do so for Government purposes only for a stated period of time. After the time period has elapsed, the GPLR will expire and the Government will be entitled to unlimited rights.

(ii) In cases where the Government would otherwise be entitled to unlimited rights, the contracting officer should not agree to accept GPLR when—

(A) Technical data are likely to be used for competitive procurement involving large numbers of potential competitors, for items such as spares; and

(B) Technical data must be published (e.g., to disclose the results of research and development efforts).

(b) *Limited rights.* (1) Except as provided in paragraph (b)(2), the

Government will obtain limited rights in unpublished technical data pertaining to items, components, or processes developed exclusively at private expense, provided the data are properly marked with the limited rights legend and, provided they are not technical data described in paragraph (a) above.

(2) *Exception to limited rights—obtaining greater rights in technical data.* (i) If the Government needs data rights pertaining to items, components, or processes developed exclusively at private expense to develop alternative sources, the contracting officer may negotiate with the contractor or subcontractor to acquire additional rights and technical assistance, where appropriate. Before acquiring additional rights, the contracting officer should consider alternatives, such as—

(A) Developing alternate items, components, or processes; or

(B) Obtaining a commitment by the contractor or subcontractor to qualify additional sources.

(ii) Greater rights in technical data may be obtained by negotiation of a lump sum fee, royalty, GPLR or other arrangement. Any greater rights shall be stated as a separate contract line item. The contracting officer shall not acquire any greater rights unless—

(A) There is a need for disclosure outside the Government; and

(B) If the specific rights are required for competitive procurement, the anticipated savings from competition are likely to exceed the acquisition cost of the technical data and the rights therein.

(c) *Rights in technical data pertaining to items, components, and processes developed with mixed funding.* As required by 10 U.S.C. 2320, the contracting officer will negotiate rights in technical data associated with an item, component, or process developed in part with Government funds and in part at private expense (mixed funding) whenever a contractor provides the notice contained in 252.227-7035 or 252.227-7013 with respect to such data. Absent the notice, the Government shall have unlimited rights in the technical data and shall have met the obligation to negotiate. Negotiations shall begin at the earliest possible time and the results shall be incorporated into the contract, preferably at time of award, but in any event before delivery of the data.

227.473 General procedures.

227.473-1 Procedures for establishing rights in technical data.

(a) *Notification requirements—(1) Background.* The provision at 252.227-7035 and the clause at 252.227-7013

require offerors and contractors to notify the Government of any asserted restrictions on the Government's right to use or disclose technical data or computer software. This notice advises the contracting officer of the contractor's or any subcontractor's intended use of items, components, processes, or computer software that—

(i) Have been developed exclusively at private expense;

(ii) Have been developed in part at private expense; or

(iii) Embody technology developed exclusively with Government funds for which the contractor or subcontractor requests the Government to grant exclusive commercial rights.

(2) *Preadward notification.* If a solicitation will result in a contract requiring delivery of technical data, the provision at 252.227-7035, Preadward Notification of Rights in Technical Data and Computer Software, shall be included in the solicitation. This

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provision requires the offeror to identify items, components, processes or computer software which it intends to use and which would result in delivery of technical data to the Government with other than unlimited rights. The notification must be accompanied by the certification described in (a)(4) below.

(3) *Postaward notification.* The Government needs continuing information about the contractor's intent to use items, components, processes or computer software that would result in delivery to the Government of technical data with other than unlimited rights. The clause at 252.227-7013 requires the contractor to continue the notification process during performance of the contract by notifying the contracting officer prior to committing to the use of the privately developed item, component, process or computer software. This notification must be accompanied by the contractor's certification as described in (a)(4) below.

(4) *Certifications.* (i) If delivery of technical data is expected under a resultant negotiated contract, the provision at 252.227-7028, Requirement for Technical Data Certification, shall be included in the solicitation. The provision requires the contractor to provide the following:

(A) Identification of an existing contract or subcontract under which the technical data were delivered or will be delivered with other than unlimited rights, and the place of delivery; and

(B) Identification of the limitation on the Government's right to use the data.

(Note: use here in the complete document)

(and here!)

including identification of the earliest expiration date for the limitation.

(ii) If pursuant to the preaward or postaward notification procedures the offeror/contractor notifies the Government that technical data or computer software may be delivered with other than unlimited rights, then the notice must be accompanied by the Certification at 252.227-7038, "Listing and Certification of Technology Developed with Private Funding."

(iii) This certification authorizes the contracting officer to request additional information needed to evaluate the assertions.

(iv) This certification assists the parties to negotiate rights in technical data and computer software to be delivered to the Government with other than unlimited rights, but does not alter the rights of the parties which are contained in the clause at 252.227-7037.

(b) *Establishing rights in technical data.* (1) *General.* The contracting officer shall review and evaluate assertions contained in preaward or postaward notifications to determine the likely impact on the Government's ability to meet its needs. The contracting officer shall then either—

(i) Agree with the assertions;
(ii) Enter into negotiations to establish the respective rights of the parties; or
(iii) Determine that negotiations are not practicable, in which case the rights will be established in accordance with (d) below.

(2) *Negotiations.*—(i) *Negotiation factors.* The contracting officer shall consider the following factors when negotiating rights in technical data developed with mixed funding or when the Government negotiates to relinquish rights or to acquire greater rights:

(A) The acquisition strategy for the item or system (including logistics support);

(B) Whether the item or system (or related logistics support) will be competed;

(C) Timing of such competition;

(D) Whether the technology can be commercialized;

(E) Funding contributions of the respective parties;

(F) Development of alternative sources for industrial mobilization or other purposes;

(G) Burden on the Government of protecting the contractor's rights in technical data.

(ii) *Negotiation situations.* The following are examples of how the negotiation factors in (b)(2)(i) above may be applied:

(A) When the Government does not have an immediate need to use the data for competition and the contractor has not requested exclusive commercial

rights in the data, the Government will negotiate to establish limited rights which, upon expiration of a time limitation, shall become unlimited rights.

(B) Where the Government requires use of data for immediate competition, the contractor has requested exclusive commercial rights in the data (i.e., the data has commercial application), and protecting the contractor's rights is not unduly burdensome on the Government, the contracting officer will negotiate GPLR which will expire after a specified period of time and become unlimited rights.

(C) Where the Government requires immediate use of the data for competition and the contractor has no interest in commercializing the data, the Government may negotiate to obtain unlimited rights.

(iii) *Negotiation of time periods.* When time limitations for either GPLR or limited rights are negotiated, they shall be expressed in the contract as a date certain and should normally be no less than one year nor more than five years after the estimated date of first production delivery to the Government of the item, component, process, or computer software to which the technical data pertains.

(A) The time limitations will be based on the following factors:

(1) Relative funding contribution of the parties;

(2) Anticipated date the technical data will be needed for competition;

(3) The economic life of the technology;

(4) The contractor's or subcontractor's agreement to establish or assist in establishing additional sources of supply;

(5) The burden on the Government in restricting disclosure;

(6) The potential commercial uses of the technology;

(B) Time limitations for GPLR and limited rights ~~greater than five years~~ may be negotiated to provide the contractor a reasonable opportunity to recover its private investment, if:

(1) The technical data will not be needed for competition; and

(2) Longer periods are approved by the chief of the contracting office.

(C) Time limitations for limited rights and GPLR may be extended, if:

(1) Other interested parties have not requested access to the technical data;

(2) The technical data need not be publicly disclosed to meet a specified Government need; and

(3) The contractor provides adequate consideration for remarking any technical data with revised legends.

(iv) *Non-standard license rights.* Unlimited rights, Government purpose license rights, and limited rights and combinations of these rights (i.e., with time limitations) are considered standard license rights. All other license rights are considered non-standard license rights and shall not be negotiated unless approved by the head of the contracting activity.

(c) *Contract documentation.*—(1) *Listing.* (i) The contracting officer shall incorporate into the contract a list of any items, components, processes, and rights therein) to be delivered with other than unlimited rights.

(ii) During the life of the contract, a bilateral modification of the contract may be appropriate to incorporate the privately developed items, components, processes, or computer software identified by the contractor under the notification procedures. Also, during contract performance, changing conditions (e.g., schedule or cost) may require bilateral modification of the list.

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(iii) By the time the technical data are delivered to the Government, the list must—

(A) Identify the items components, processes, or computer software to which the technical data pertains;

(B) Identify or describe the technical data or computer software subject to other than unlimited rights; and

(C) Identify or describe, as appropriate, the category or categories of Government rights, the agreed-to time limitations, or any special restrictions on the use or disclosure of the technical data or computer software.

(2) *Standard Non-disclosure agreements.* (i) Technical data subject to other than unlimited rights shall not be released outside the Government unless the release is subject to a prohibition against further release, use, or disclosure. If the data is subject to GPLR, the recipient must sign the Standard Non-disclosure Agreement shown below. This Agreement must be executed by an official authorized to bind the contractor.

(ii) Nothing in this section impairs the rights of the developer of the data and third parties from independently entering into agreements concerning commercial uses of the data.

(iii) The contracting officer shall require each contractor receiving data subject to GPLR to execute the Standard Non-disclosure Agreement before receipt of the data. If a contractor has previously signed an agreement, the earlier agreement may be provided.

Greater than five (5) years
which approval shall not be unreasonably withheld.

Standard Non-disclosure Agreement

The undersigned,

(name)

as the authorized representative of
(company name)

(hereinafter, "the licensee"), requests technical data subject to Government Purpose License Rights (hereinafter, "GPLR data") to compete for, perform, or to prepare to compete for, or to perform Government contracts. In consideration therefore:

(1) Licensee agrees that the GPLR data identified in this agreement shall be used only for Government purposes.

(2) Licensee agrees to provide written notice and a copy of the non-disclosure agreement to the contractor whose name appears in the GPLR legend (hereinafter referred to as the "contractor") whenever it receives GPLR data. The notification shall identify the GPLR data, the date and place of its receipt and the source from which the data was received.

(3) Licensee shall not, without prior written permission of the contractor, provide or disclose any GPLR data to any other company, person or entity, except its subcontractors. The Licensee agrees not to disclose GPLR data to any subcontractor or potential subcontractor unless the subcontractor or potential subcontractor has executed the Standard Non-disclosure Agreement.

(4) Licensee agrees not to use GPLR data for commercial purposes.

(5) Licensee agrees to adopt operating procedures and physical security measures designed to protect GPLR data from disclosure or release to unauthorized third parties.

(6) Licensee agrees to indemnify the Government, its agents and employees from all liability arising out of, or in any way related to, the misuse or unauthorized disclosure by the licensee, its employees or agents of any GPLR data it received. Licensee will hold the Government, its agents and employees harmless against any claim or liability, including attorney fees, costs and expenses, arising out of the misuse or unauthorized disclosure of any GPLR data supplied to the licensee hereunder.

(7) Execution of this non-disclosure agreement by the licensee or any of its authorized subcontractors is for the benefit of the contractor identified in the legend on any GPLR data received. Any such contractor is a third party beneficiary of this agreement who may have the right of direct action against the licensee to enforce the agreement or

to seek damages which may result from any material breach of the agreement.

(8) This agreement shall be effective only for so long as the data remains unpublished (or until the GPLR legend expires).

Signed this ____ day of ____, 19__

Licensee

(d) *Negotiation impracticable.* (1) The contracting officer may determine that negotiations are impracticable when there are numerous offerors or when an award must be made under urgent circumstances. This determination must be approved by the chief of the contracting office. In such cases the contracting officer will notify the contractor. The contracting officer's notification shall provide that if, after receiving the notice, the contractor elects to use the item, component, or process that is asserted to be developed in part at private expense, it shall provide written notice to the contracting officer. In that event, the contracting officer shall insert a provision in the contract providing procedures for subsequent negotiation of the respective rights of the parties.

(2) Data rights need not be negotiated for small purchases and contracts awarded using sealed bidding.

(e) *Contract clause.* The contracting officer shall insert the basic data clause at 252.227-7013, Rights in Technical Data and Computer Software, in solicitations and contracts when technical data is specified to be delivered or computer software may be originated, developed, or delivered, provided that such clause shall not be used in solicitations and contracts—

(1) When existing works are to be acquired in accordance with 227.477;

(2) When special works are to be acquired in accordance with 227.476;

(3) When the work will be performed by foreign sources in accordance with 227.475-5; and

(4) For architect-engineer services or construction in accordance with 227.478.

227.473-2 Prohibitions.

(a) In accordance with 10 U.S.C. 2320(a)(1), a contractor or subcontractor may not be prohibited from receiving from a third party a fee or royalty for the use of technical data pertaining to an item, component, or process developed exclusively at private expense by the contractor or subcontractor, except as otherwise specifically provided by law.

(b)(1) In accordance with 10 U.S.C. 2320(a)(2)(F), a contractor or a subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition of being

responsive to a solicitation or as a condition for the award of a contract or subcontract—

(i) To sell or otherwise relinquish to the United States any rights in technical data beyond those to which the Government is entitled under 10 U.S.C. 2320(a)(2) (C) and (D); or

(ii) To refrain from offering to use, or from using, an item, component, or process to which the contractor is entitled to restrict the Government's rights in technical data under 10 U.S.C. 2320(a)(2)(B).

(2) It is permissible to evaluate such factors as the impact on life cycle costs of limitations on the Government's ability to use or disclose the technical data. Further, nothing prohibits agreements which provide the Government with greater rights than it would otherwise be entitled to, for a fair and reasonable price (see 227.472-3(b)(2)).

(c) Prime contractors and higher-tier subcontractors are prohibited from using their power to award subcontracts as economic leverage to acquire rights in

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technical data from their subcontractors. A subcontractor, who would have the right pursuant to 227.472-3(b) to furnish technical data with limited rights, may furnish data directly to the Government rather than through the prime contractor, with prior notice to the prime contractor. 227.473-3 Marking and Identification Requirements.

(a) *Clauses.* The contracting officer shall include the clauses at 252.227-7018 and 252.227-7029 in all contracts which also contain the clause at 252.227-7013. These clauses contain marking requirements for technical data and computer software and related procedures.

(b) *Contractor marking procedures.* The contractor's procedures required under the clause at 252.227-7018 shall be reviewed by the contract administration office and the contracting officer may withhold payments under the clause at 252.227-7030 for failure to establish, maintain and follow adequate marking procedures.

(c) *Unmarked technical data.* Technical data received with no restrictive markings are deemed to be furnished with unlimited rights. However, within six months after delivery of such data, the contractor may request permission to place restrictive markings on the data at its own expense. The contracting officer may approve the request if the contractor—

re 227.473-3 (4)

The contracting officer's
notification shall provide
that, if after receiving the
notice, the contractor does not
establish, maintain and follow
adequate marking procedures,
the contracting officer may insert
a bilateral modification in the
contract providing for the with-
hold of payments under the
clause at 252.227-7030 for
failure to satisfy the marking
requirements of 252.227-7018
and 252.227-7029.

(1) Demonstrates that the omission was inadvertent;

(2) Establishes that the use of the markings is authorized; and

(3) Relieves the Government of liability with respect to the technical data.

(d) *Unjustified markings.* If the contracting officer believes that restrictive markings are not justified, the contracting officer will follow the procedures in 227.473-4 and the clause at 252.227-7037.

(e) *Non-conforming markings.* If technical data which the contractor is authorized by the contract to furnish with restrictive markings is received with non-conforming markings, the technical data shall be used according to the proper restriction, and the contractor shall be required to correct the markings to conform with the contract. Copyright notices which conform to the requirement in 17 U.S.C. 401 and 402 are not considered restrictive markings. If the contractor fails to correct the markings within 60 days after notice, Government personnel may correct the markings at the contractor's expense, notify the contractor in writing, and thereafter may use the technical data accordingly.

227.473-4 Validation of restrictive markings on technical data.

(a) *General.* The clause at 252.227-7037 sets forth rights and procedures pertaining to the validation of restrictive markings asserted by contractors and subcontractors on deliverable technical data and shall be included in all solicitations and contracts which require the delivery of technical data. The Government ~~should~~ review the validity of any asserted restriction on technical data deliverable under a contract. This review should be accomplished before acceptance of the technical data, but no later than three years after final payment or three years after delivery of the technical data to the Government, whichever is later. The contracting officer may challenge restrictive markings if there are reasonable grounds to question their validity but only if the three-year period has not expired. However, the Government may challenge a restrictive marking at any time if the technical data (1) is publicly available; (2) has been furnished to the United States without restriction; or (3) has been otherwise made available without restriction. Only the contracting officer's final decision resolving a formal challenge constitutes "validation" as addressed in 10 U.S.C. 2321. A decision by the Government not to challenge a restrictive marking or

asserted restriction does not constitute "validation".

(b) *Prechallenge request for information.* (1) Prior to making a written determination to challenge, the contracting officer must request the contractor or subcontractor to furnish information explaining the basis for any asserted restriction. If this information is incomplete, additional justification should be requested. The contracting officer should provide a reasonable time for submission of the required data.

(2) The contracting officer should request advice from the cognizant Government activity having interest in the validity of the markings.

(3) If the contracting officer, after reviewing all available information, determines that reasonable grounds exist to question the current validity of a restrictive marking, and that continued adherence to the marking would make subsequent competition impracticable or if the contractor or subcontractor fails to respond to the prechallenge request within a reasonable period, the contracting officer shall challenge the restriction following the procedures in the clause at 252.227-7037.

227.473-5 Remedies for noncomplying technical data.

(a) When data does not comply with the contract, the contracting officer should consider all remedies. These remedies include reduction of progress payments, withholding final payment, contract termination, and a reduction in contract price or fee.

(b) The clause at 252.227-7030, Technical Data—Withholding of Payment, is designed to assure timely delivery of technical data and shall be included in solicitations and contracts requiring delivery of technical data. Unless the contract specifies a lesser withholding limit, the clause permits withholding up to 10 percent of the contract price. The contracting officer shall determine the amount to be withheld after considering the estimated value of the technical data to the Government. Payment shall not be withheld when non-delivery results from causes beyond the control and without the fault or negligence of the contractor.

(c) If delivery of technical data is required, the clause at 252.227-7036, Certification of Technical Data Conformity, shall be included in solicitations and any resultant contract.

227.473-6 (Reserved)

227.474 (Reserved)

227.475 Other procedures.

227.475-1 Data requirements.

(a) The clause at 252.227-7031, Data Requirements, shall be included in all solicitations and contracts, except that the clause need not be included in—

(1) Any contract or order less than \$25,000;

(2) Any contract awarded to a contractor outside the United States, except those awarded under Subpart 225.71, Canadian Purchases;

(3) Any research or exploratory development contract when reports are the only deliverable item(s);

(4) Any service contract, when the contracting officer determines that the use of the DD Form 1423 is impractical;

(5) Any contract under which construction and architectural drawings and specifications are the only deliverable items;

(6) Any contract for commercial items when the only deliverable data is such an item, or would be packaged or furnished with such items in accordance with customary trade practices; or

(7) Any contract for items containing potentially dangerous material requiring controls to assure adequate safety, when the only deliverable data is the

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Materials Safety Data Sheet (MSDS) required by the clause at FAR 52.223-3.

(b) The clause at 252.227-7031, Data Requirements, states that the contractor is required to deliver only data listed on the DD Form 1423 and data deliverable under clauses prescribed in the FAR and DFARS, and make a part of the contract.

227.475-2 Deferred delivery and deferred ordering.

(a) *General.* Technical data and computer software is expensive to prepare, maintain and update. By delaying the delivery of technical data or software until needed, storage requirements are reduced and the probability of using obsolete technical data and computer software is decreased. Purchase of technical data and computer software which may become obsolete because of hardware changes is also minimized.

(b) *Deferred delivery.* When the contract requires delivery of technical data or computer software, but does not contain a time for delivery, the clause at 252.227-7026 "Deferred Delivery of Technical Data and Computer Software", shall be included in the contract. The clause permits the contracting officer to require the delivery of data identified as "deferred delivery" data at any time until two years after acceptance by the

for its acts prior to the date of the contractor's request.

may

Government of all items (other than data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors to deliver such technical data expires two years after the date the prime contractor accepts the last item from the subcontractor for use in the performance of the contract. The contract must specify which technical data or computer software will be subject to deferred delivery. The contracting officer ~~should~~ provide sufficient notice to permit timely delivery of the technical data or computer software.

(c) *Deferred ordering.* When a potential need exists for technical data or computer software, but a firm requirement is not established, the clause at 252.227-7027, "Deferred Ordering of Technical Data or Computer Software", should be included in the contract. Under this clause, the contracting officer may order any technical data or computer software that has been generated as part of the performance of the contract. The contracting officer may order technical data or computer software under this clause at anytime until three years after acceptance of all items (other than technical data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors to deliver such technical data or computer software expires three years after the date the contractor accepts the last item under the subcontract. When the data and computer software is ordered, the delivery dates shall be negotiated and the contractor compensated for *locating and* converting the technical data or computer software into the prescribed form. Compensation to the contractor shall not include the cost of technical data or computer software which the Government has already paid for.

227.475-3 Warranties of technical data.

The factors contained in Subpart 246.7, Warranties, shall be considered in deciding whether to include warranties of technical data. The basic technical data warranty clause is set forth in the clause at 252.246-7001. There are two alternates to the basic clause. The basic clause and appropriate alternate should be selected in accordance with section 246.708.

227.475-4 Delivery of technical data to foreign governments.

When the Government proposes to make technical data subject to limited rights available for use by a foreign

government, it will, to the maximum extent practicable, give reasonable notice to the contractor or subcontractor asserting rights in the technical data. Any release shall be subject to a prohibition against further release, use or disclosure.

227.475-5 Overseas contracts with foreign sources.

The clause at 252.227-7032, Rights in Technical Data and Computer Software (Foreign), should be used in solicitations and contracts with foreign sources when the Government will acquire unlimited rights in all deliverable technical data, and computer software. However, the clause shall not be used in contracts for special works (see section 227.476), contracts for existing works (see section 227.477), or contracts for Canadian purchases (see Subpart 225.71, Canadian Purchases). However, the clause at 252.227-7013, "Rights in Technical Data and Computer Software", shall be used whenever the rights to be obtained are those which would be obtained if contracting with United States firms. Either clause may be modified to meet the peculiar requirements of the foreign acquisition; *Provided*, it is consistent with sections 227.472 and 227.481.

227.475-6 [Reserved]

227.475-7 [Reserved]

227.475-8 Publication for sale.

Alternate I of the clause at 252.227-7013, Rights in Technical Data and Computer Software, may be used in research contracts when the contracting officer determines, in consultation with counsel, that public dissemination by the contractor:

(a) Would be in the interest of the Government;

(b) Would be facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

227.476 Special works.

(a) The clause at 252.227-7020, Rights in Data—Special Works, shall be used in all contracts where the Government needs ownership and control of the work to be generated under the contract. Examples include:

(1) Production of audiovisual works including motion pictures;

(2) Television recordings with or without accompanying sound;

(3) Preparation of motion picture scripts, musical compositions, sound tracks, translations, adaptations, and the like;

(4) Histories of the respective Departments for services or units thereof;

(5) Works pertaining to recruiting, morale, training, or career guidance;

(6) Works pertaining to the instruction or guidance of Government officers and employees in the discharge of their official duties; and

(7) Production of technical reports and studies.

(b) Contracts for audiovisual works may include limitations in connection with music licenses, talent releases, and the like which are consistent with the purpose for which the works are acquired.

227.477 Contracts for acquisition of existing works.

(a) *Acquisition of existing works.* (1) The clause at 252.227-7021, Rights in Data—Existing Works, shall be used in contracts exclusively for the acquisition of existing motion pictures, television recordings, or other audiovisual works. The contract may contain limitations consistent with the purposes for which the material covered by the contract is being acquired. Examples of these limitations are—(i) means of exhibition or transmission; (ii) time; (iii) type of audience; and (iv) geographical location. The indemnity language in paragraph (c)

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of the clause may be modified to be consistent.

(2) In contracts which call for the modification of existing motion pictures, television records, or other audiovisual works through editing, translation, or addition of subject matter, the clause at 252.227-7020, Rights in Data—Special Works, appropriately modified, shall be used.

(b) *Off-the-shelf acquisition of books and similar items.* Unless the right to reproduce technical data is an objective of the contract, no contract clause prescribed in this part need be included in contracts solely to acquire data, other than motion pictures, which exist before the start of the acquisition (such as the off-the-shelf acquisitions of existing products).

227.478 Architect-engineer and construction contracts.

227.478-1 General.

This section sets forth policies and procedures, pertaining to data, copyrights, and restricted designs unique to the acquisition of construction and architect-engineer services.

227.478-2 Acquisition and use of plans, specifications, and drawings.

(a) *Architectural designs and data clauses for architect-engineer or construction contracts—(1) Plans and specifications and as-built drawings.* (i) Except as provided in (a)(1)(ii) below, use the clause at 252.227-7022, Government Rights (Unlimited), in solicitations and contracts for architect-engineer services and for construction involving architect-engineer services.

(ii) When the purpose of a contract for architect-engineer services or for construction involving architect-engineer services is to obtain a unique architectural design of a building, a monument, or construction of similar nature, which for artistic, aesthetic or other special reasons the Government does not want duplicated, the Government may acquire exclusive control of the data pertaining to design by including the clause at 252.227-7023, Drawings and Other Data to Become Property of Government, in solicitations and contracts.

(2) *Shop drawings for construction.* The Government shall obtain unlimited rights in shop drawings for construction. In solicitations and contracts calling for delivery of shop drawings, include the clause at 252.227-7033, Rights in Shop Drawings.

227.478-3 Contracts for construction supplies and research and development work.

The provisions and clauses required by this section shall not be used when the acquisition is limited to either (a) construction supplies or materials, (b) experimental, developmental, or research work, or test and evaluation studies of structures, equipment, processes, or materials for use in construction; or (c) both.

227.478-4 [Reserved]**227.478-5 Approval of restricted designs.**

The clause at 252.227-7024, Notice and Approval of Restricted Designs, may be included in architect-engineer contracts to permit the Government to make informed decisions concerning noncompetitive aspects of the design.

227.479 Small Business Innovative Research Program (SBIR Program).

(a) Public Law 97-219, "Small Business Innovation Development Act of 1982", requires the Department of Defense to establish a Small Business Innovation Research Program (SBIR Program). Small Business Administration (SBA) Policy Directive

No. 65-01 provides guidance on the program.

(b)(1) Data and computer software generated under an SBIR program contract shall not be disclosed outside the Government for two years after contract completion, except—

(i) When necessary for program, evaluation, or

(ii) When the contractor consents in writing to additional disclosure.

(2) Upon expiration of the period of non-disclosure, the Government shall have a nonexclusive, worldwide, royalty-free license in technical data and computer software for Government use.

(c) Copyrights in technical data and computer software generated under an SBIR program contract shall, when agreed to in writing by the contracting officer, be owned by the contractor. The Government should obtain a royalty-free license under any copyright. Each publication of copyrighted material should contain an appropriate acknowledgment and disclaimer statement.

(d) The clause at 252.227-7013, Rights in Technical Data and Computer Software, with its Alternate II, shall be included in all contracts awarded under the SBIR Program which require delivery of technical data or computer software.

227.480 Copyrights.

(a) In general, the copyright law gives an owner of copyright the exclusive rights to—

- (1) Reproduce the copyrighted work;
- (2) Prepare derivative works;
- (3) Distribute copies or phonorecords to the public;
- (4) Perform the copyrighted work publicly; and
- (5) Display the copyrighted work publicly.

(b) ~~Any~~ material that is protected under the Copyright law is not in the public domain, even though it may have been published. Acts inconsistent with the rights in (a) above may not be exercised without a license from the copyright owner.

(c) Department of Defense policy allows the contractor to copyright any work of authorship first prepared, produced, originated, developed, or generated under a contract, unless the work is designated a "special work". If the work is a special work, the Government retains ownership and control of the work. The contractor may not assert any rights or claim to copyright in special works. The contractor is required to grant to the Government and authorize the

Government to grant to others a nonexclusive, paid-up, worldwide license for Government purposes in any work of authorship (other than a "special work") first prepared, produced, originated, developed, or generated under the contract.

(d) The clause at 252.227-7013, Rights in Technical Data and Computer Software, requires the contractor to grant the Government and authorizes the Government to grant to others a nonexclusive, paid-up, worldwide license for Government purposes, under any copyright owned by the contractor in any technical data or computer software prepared for or acquired by the Government under the contract. The clause at 252.227-7020, Rights in Data—Special Works, requires that any work first produced in the performance of the contract become the sole property of the Government, and the contractor agrees not to assert any rights or establish any claim to copyright in such work. This clause requires that the contractor grant to the Government and authorize the Government to grant to others a nonexclusive, paid-up, worldwide license for Government purposes in any portion of a work which is not first produced in the performance of the contract but in which copyright is owned by the contractor and which is incorporated in the work furnished under the contract.

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(e) The clauses at 252.227-7013 and 252.227-7020 provide that, unless written approval of the contracting officer is obtained, the contractor agrees not to include in any work prepared, produced, originated, developed, generated or acquired under the contract; any work of authorship in which copyright is not owned by the contractor without acquiring for the Government and those acting by or on behalf of the Government a nonexclusive, paid-up, worldwide license for Government purposes in the copyrighted work.

227.481 Acquisition of rights in computer software. TEXT IS MISSING!!!

227.482 [Reserved]

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Sections 252.227-7013, 252.227-7018 through 252.227-7024, 252.227-7028 through 252.227-7037 are revised; sections 252.227-7016, 252.227-7017 and 252.227-7025 are removed and reserved; and section 252.227-7038 is added to read as follows:

In view of the exclusive rights in (a) above, any

252.227-7013 Rights in technical data and computer software.

As prescribed at 227.472-3(e) and 227.479(d), insert the following clause:

Rights in Technical Data and Computer Software (APR 1988)**(a) Definitions.**

(1) "Commercial computer software", as used in this clause, means computer software which is used regularly for other than Government purposes and is sold, licensed, or leased in significant quantities to the general public at established market or catalog prices.

(2) "Computer", as used in this clause, means a data processing device capable of accepting data, performing prescribed operations on the data, and supplying the results of these operations; for example, a device that operates on discrete data by performing arithmetic and logic processes on the data, or a device that operates on analog data by performing physical processes on the data.

(3) "Computer data base", as used in this clause, means a collection of data in a form capable of being processed and operated on by a computer.

(4) "Computer program", as used in this clause, means a series of instructions or statements in a form acceptable to a computer, designed to cause the computer to execute an operation or operations. Computer programs include operating systems, assemblers, compilers, interpreters, data management systems, utility programs, sort-merge programs, and ADPE maintenance/diagnostic programs, as well as applications programs such as payroll, inventory control, and engineering analysis programs. Computer programs may be either machine-dependent or machine-independent, and may be general-purpose in nature or be designed to satisfy the requirements of a particular user.

(5) "Computer software", as used in this clause, means computer programs and computer data bases.

(6) "Computer software documentation", as used in this clause, means technical data, including computer listings and printouts, in human-readable form which (i) documents the design or details of computer software, (ii) explains the capabilities of the software, or (iii) provides operating instructions for using the software to obtain desired results from a computer.

(7) "Data", as used in this clause, means recorded information, regardless of form or method of the recording.

(8) "Detailed design data", as used in this clause, means technical data that describes the physical configuration and performance characteristics of an item or component in sufficient detail to ensure that an item or component produced in accordance with the technical data will be essentially identical to the original item or component.

(9) "Detailed manufacturing or process data", as used in this clause, means technical data that describes the steps, sequences, and conditions of manufacturing, processing or assembly used by the manufacturer to produce an item or component or to perform a process.

(10) "Developed", as used in this clause, means that the item, component, or process

exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered "developed", the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component or process be actually reduced to practice within the meaning of Title 35 of the United States Code.

(11) "Developed Exclusively with Government Funds", as used in this clause, means, in connection with an item, component, or process, that the cost of development was directly paid for in whole by the Government or that the development was required ~~as an element of performance~~ under a Government contract or subcontract.

(12) "Developed Exclusively at Private Expense", as used in this clause, means, in connection with an item, component, or process, that no part of the cost of development was paid for by the Government and that the development was not required ~~as an element of performance~~ under a Government contract or subcontract. Independent research and development and bid and proposal costs, as defined in FAR 31.205-18 (whether or not included in a formal independent research and development program), are considered to be at private expense. All indirect costs of development are considered Government funded when development was required ~~as an element of performance~~ in a Government contract or subcontract. They are considered funded at private expense when development was not required ~~as an element of performance~~ under a Government contract or subcontract.

(13) "Form, fit, and function data", as used in this clause, means technical data that describes the required overall physical, functional, and performance characteristics, (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

(14) "Government purpose license rights" (GPLR), as used in this clause, means rights to use, duplicate, or disclose data (and in the SBIR Program, computer software), in whole or in part and in any manner, for Government purposes only, and to have or permit others to do so for Government purposes only. Government purposes include competitive procurement, but do not include the right to have or permit others to use technical data (and in the SBIR Program, computer software) for commercial purposes.

(15) "Limited rights", as used in this clause, means rights to use, duplicate, or disclose technical data, in whole or in part, by or for the Government, with the express limitation that such technical data shall not, without the

written permission of the party asserting limited rights, be: Released or disclosed outside the Government; used by the Government for manufacture, or in the case of computer software documentation, for preparing the same or similar computer software; or used by a party other than the Government, except when:

(i) Release, disclosure, or use is necessary for emergency repair or overhaul; provided that the release, disclosure, or use outside the Government shall be made subject to a prohibition against further use, release, or disclosure, and that the party asserting limited rights be notified by the contracting officer of such release, disclosure, or use; or

(ii) Release or disclosure to a foreign government that is in the interest of the United States and is required for evaluational or informational purpose under the conditions of (a) above, except that the release or disclosure may not include detailed manufacturing or process data.

(16) "Required as ~~an element of performance~~ *an element of a Development* Under a Government Contract or Subcontract", as used in this clause, means, in connection with the development of an item, component, or process, that the development was specified in a Government contract or subcontract ~~as that the development was necessary for performance of a Government contract or subcontract.~~

(17) "Restricted rights", as used in this clause, means rights that apply only to computer software, and include, as a minimum, the right to—

(i) Use computer software with the computer for which or with which it was acquired, including use at any Government

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installation to which the computer may be transferred by the Government;

(ii) Use computer software with a backup computer if the computer for which or with which it was acquired is inoperative;

(iii) Copy computer programs for safekeeping (archives) or backup purposes; and

(iv) Modify computer software, or combine it with other software, subject to the provision that those portions of the derivative software incorporating restricted rights software are subject to the same restricted rights. In addition, restricted rights include any other specific rights not inconsistent with the minimum rights in (a)(17) (i)-(iv) above that are listed or described in the contract or described in a license agreement made a part of the contract.

(18) "Technical data", as used in this clause, means recorded information, regardless of the form or method of the recording of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

(19) "Unlimited rights", as used in this clause, means rights to use, duplicate, release, or disclose, technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(20) "Unpublished", as used in this clause,

means that technical data or computer software has not been released to the public or furnished to others without restriction on further use or disclosure. Delivery of other than unlimited rights technical data or computer software to or for the Government under the contract does not, in itself, constitute release to the public.

(b) *Rights in Technical Data*—(1)

Unlimited Rights. Unless otherwise agreed in writing, the Government is entitled to and will receive unlimited rights in:

(i) Technical data pertaining to an item, component, or process which has been or will be developed exclusively with Government funds;

(ii) Technical data resulting directly from performance of experimental, developmental, or research work which was specified as an element of performance under this or any other Government contract or subcontract;

(iii) Form, fit, and function data pertaining to items, components, or processes prepared or required to be delivered under this or any other Government contract or subcontract;

(iv) Manuals or instructional materials (other than detailed manufacturing or process data) prepared or required to be delivered under this or any other contract or any subcontract hereunder necessary for installation, operation, maintenance, or training purposes;

(v) Technical data prepared or required to be delivered under this or any other Government contract or subcontract and constituting corrections or changes to Government-furnished data or computer software;

(vi) Technical data which is otherwise publicly available, or has been released or disclosed by the Contractor or subcontractor, without restriction on further release or disclosure;

(vii) Technical data in which the Government has obtained unlimited rights as a result of negotiations;

(viii) Technical data previously delivered subject to either GPLR or limited rights and the restrictive condition has expired; and

(ix) Technical data delivered under the contract, which at the time of delivery, are not identified in the listing required by paragraph (k) of this clause.

(2) *Government Purpose License Rights.* The Government shall have Government purpose license rights (GPLR) in technical data which the parties have agreed will be furnished with GPLR. The Government may disclose or provide GPLR data to a person or corporation that has executed the Standard Non-Disclosure Agreement. This agreement establishes the third party beneficiary status of the Contractor identified in the GPLR legend. If the recipient of GPLR data has executed the Standard Non-Disclosure Agreement, the Contractor shall have no claim or right of action against the Government for damages related to misuse or unauthorized disclosure of the data. GPLR shall be effective, during the time period specified in the contract, only when the portion or portions of each piece of data subject to such rights are identified (for example, by circling, underscoring, or a note), and are marked with the legend below containing:

(i) The number of the prime contract under which the technical data is to be delivered;

(ii) The name of the Contractor and/or any subcontractor asserting Government purpose license rights; and

(iii) The date when the data will be subject to unlimited rights.

Government Purpose License Rights Legend

Contract No. _____
Contractor: _____

Government purpose license rights shall be effective until

(insert date certain)

thereafter, the Government purpose license rights will expire and the Government shall have unlimited rights in the technical data.

The restrictions governing use of technical data marked with this legend are set forth in the definition of "Government Purpose License Rights" in paragraph (a)(14) above. This legend, together with the indications of the portions of this data which are subject to Government purpose license rights, shall be included on any reproduction hereof which includes any part of the portions subject to such limitations.

(3) *Limited Rights.* Unless otherwise agreed, the Government shall have limited rights in:

(i) Technical data pertaining to items, components, processes or computer software developed exclusively at private expense, except for data in the categories in (a)(1) above;

(ii) Technical data that the parties have agreed will be subject to limited rights for a specified period of time; and

(iii) Technical data listed or described in a license agreement made a part of the contract and subject to conditions other than those described in the definitions of limited rights. Notwithstanding any contrary provision in the license agreement, the Government shall have the rights included in the definition of "limited rights" in paragraph (a)(15) above.

Limited rights will remain in effect so long as the technical data remains unpublished and provided that only the portions of each piece of data subject to limited rights are identified (for example, by circling, underscoring, or a note), and the piece of data is marked with the legend below containing:

(A) The number of the prime contract under which the technical data is to be delivered; and

(B) The name of the Contractor and/or any subcontractor asserting limited rights.

(C) The date the data will be subject to unlimited rights (if applicable).

Limited Rights Legend

Contract No. _____
Contractor: _____

(For technical data which the parties have agreed will be subject to limited rights for a specified time period, insert the agreed upon date. If the limited rights are not subject to an expiration date, so indicate).

Limited rights shall be effective until

(insert date certain)

thereafter the limited rights will expire and the Government shall have unlimited rights in the technical data.

The restrictions governing the use and disclosure of technical data marked with this legend are set forth in the definition of "limited rights" in paragraph (a)(15) above. (For technical data which the parties have agreed will be subject to rights other than those described in the definitions of limited rights or GPLR in paragraphs (a)(15) and (a)(14) above, insert the following statement:

In addition to the minimum rights described in the definition of limited rights in DFARS clause at 252.227-7013, the Government shall have the rights described in the license or agreement made a part of Contract No. _____

This legend, together with the indications of the portions of this data which are subject to limited rights, shall be included on any reproduction hereof which includes any part of the portions subject to such limitations. This technical data will remain subject to limited rights only so long as it remains "unpublished" as defined in paragraph (a) above.

(c) *Rights in Computer Software*—(1)

Restricted Rights. (i) The Government shall have restricted rights in computer software, listed or described in a license agreement made a part of this contract, which the parties have agreed will be furnished with restricted rights. Notwithstanding any contrary provision in any such license agreement, the Government shall have the rights included in the definition of "restricted

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rights" in paragraph (a)(17) above. Unless the computer software is marked by the Contractor with the following legend:

Restricted Rights Legend

Use, duplication or disclosure is subject to restrictions stated in Contract No. _____ with _____ (Name of Contractor) _____

and the related computer software documentation includes a prominent statement of the restrictions applicable to the computer software, the Government shall have unlimited rights in the software. The Contractor may not place any legend on computer software restricting the Government's rights in such software, unless the restrictions are set forth in a license agreement made a part of this contract prior to the delivery date of the software. Failure of the Contractor to apply a restricted rights legend to the computer software shall relieve the Government of liability with respect to the unmarked software.

(ii) Notwithstanding subparagraph (c)(1)(i) above, commercial computer software and related documentation developed at private expense and not in public domain may be marked with the following Legend:

Restricted Rights Legend

Use, duplication, or disclosure by the Government is subject to restrictions as set forth in subparagraph (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at DFARS 252.227-7013.

(Name of Contractor and Address)
When acquired by the Government.

commercial computer software and related documentation so legended shall be subject to the following:

(A) Title to and ownership of the software and documentation shall remain with the Contractor.

(B) User of the software and documentation shall be limited to the facility for which it is acquired.

(C) The Government shall not provide or otherwise make available the software or documentation, or any portion thereof, in any form, to any third party without the prior written approval of the Contractor. Third parties do not include prime contractors, subcontractors and agents of the Government who have the Government's permission to use the licensed software and documentation at the facility, and who have agreed to use the licensed software and documentation only in accordance with these restrictions. This provision does not limit the right of the Government to use software, documentation, or information therein, which the Government has or may obtain without restrictions.

(D) The Government shall have the right to use the computer software and documentation with the computer for which it is acquired at any other facility to which that computer may be transferred; to use the computer software and documentation with a backup computer when the primary computer is inoperative; to copy computer programs for safekeeping (archives) or backup purposes; and to modify the software and documentation or combine it with other software, *Provided*, that the unmodified portions shall remain subject to these restrictions.

(2) *Unlimited Rights.* The Government shall have unlimited rights in:

(i) Computer software resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any other Government contract or subcontract;

(ii) Computer software required to be originated or developed under a Government contract, or generated as a necessary part of performing a contract;

(iii) Computer data bases, prepared under a Government contract, consisting of information supplied by the Government, information in which the Government has unlimited rights, or information which is in the public domain;

(iv) Computer software prepared or required to be delivered under this or any other Government contract or subcontract and constituting corrections or changes to Government-furnished computer software; and

(v) Computer software which is otherwise publicly available, or has been, or is normally released, or disclosed by the Contractor or subcontractor without restriction on further release or disclosure.

(d) *Technical Data and Computer Software Previously Provided Without Restriction.* Contractor shall assert no restrictions on the Government's rights to use or disclose any data or computer software which the Contractor has previously delivered to the Government without restriction. The limited or restricted rights provided for by this clause

shall not impair the right of the Government to use similar or identical data or computer software acquired from other sources.

(e) *Copyright.* (1) In addition to the rights granted under the provisions of paragraphs (b) and (c) above, the Contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world, of the scope set forth below, under any copyright owned by the Contractor, in any work of authorship prepared for or acquired by the Government under this contract, to reproduce the work in copies or phonorecords, to distribute copies or phonorecords to the public, to perform or display the work publicly, and to prepare derivative works thereof, and to have others do so for Government purposes. With respect to technical data and computer software in which the Government has unlimited rights, the license shall be of the same scope as the rights set forth in the definition of "unlimited rights" in (a)(19) above. With respect to technical data in which the Government has limited rights, the scope of the license is limited to the rights set forth in the definition of "limited rights". With respect to computer software which the parties have agreed will be furnished with restricted rights, the scope of the license is limited to such rights.

(2) Unless written approval of the Contracting Officer is obtained, the Contractor shall not include (in technical data or computer software prepared for or acquired by the Government under this contract) any works of authorship in which copyright is not owned by the Contractor without acquiring for the Government any rights necessary to perfect a copyright license of the scope specified herein.

(3) The Contractor shall be considered the "person for whom the work was prepared" for the purpose of determining authorship under 17 U.S.C. 201(b).

(4) Technical data delivered under this contract bearing a copyright notice shall also include the following statement:

This material may be reproduced by or for the U.S. Government pursuant to the copyright license under the clause at DFARS 252.227-7013 (date).

(f) *Removal of Unjustified and Nonconforming Markings—(1) Unjustified Technical Data Markings.* Notwithstanding any provision of this contract concerning inspection and acceptance, the Government may, at the Contractor's expense, correct, cancel, or ignore any marking not justified by the terms of this contract on any technical data furnished hereunder in accordance with the clause of this contract entitled "Validation of Restrictive Markings on Technical Data", DFARS 252.227-7037.

(2) *Nonconforming Technical Data Markings.* Correction of nonconforming markings is not subject to this clause. The Government may, at the Contractor's expense, correct any nonconforming markings if the Contracting Officer notifies the Contractor and the Contractor fails to correct the nonconforming markings within sixty (60) days.

(3) *Unjustified and Nonconforming Computer Software Markings.* Notwithstanding any provision of this contract concerning inspection and

acceptance, the Government may correct, cancel, or ignore any marking not authorized by the terms of this contract on any computer software furnished hereunder, if:

(i) The Contractor fails to respond within sixty (60) days to a written inquiry by the Government concerning the propriety of the markings; or

(ii) The Contractor's response fails to substantiate, within sixty (60) days after written notice, the propriety of restricted rights markings.

In either case, the Government shall give written notice to the Contractor of the action taken.

(g) *Relation to Patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government under any patent.

(h) *Limitation on Charges for Data and Computer Software.* The Contractor recognizes that the Government is not obligated to pay, or to allow to be paid, any charges for data or computer software which the Government has a right to use and disclose to others without restriction and Contractor agrees to refund any such payments. This provision applies to contracts that involve payments by subcontractors and those entered into through the Military Assistance Program, in addition to U.S. Government prime contracts. It does not apply to reasonable reproduction, handling, mailing, and similar administrative costs.

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(i) *Acquisition of Technical Data and Computer Software from Subcontractors.* (1) Whenever any technical data or computer software is to be obtained from a subcontractor under this contract, the Contractor shall use this same clause in the subcontract, without alteration, and no other clause shall be used to enlarge or diminish the Government's or the Contractor's rights in the subcontractor data or computer software.

(2) Technical data required to be delivered by a subcontractor shall normally be delivered to the next higher-tier contractor.

However, when there is a requirement in the prime contract for data which may be submitted with other than unlimited rights by a subcontractor, then said subcontractor may fulfill its requirement by submitting such data directly to the Government, rather than through the prime Contractor. *subject to prior notice to the prime contract*

(3) The Contractor and higher-tier subcontractors will not use their power to award subcontracts as economic leverage to obtain rights in technical data or computer software from their subcontractors.

(j) *Notice of Limitations on Government Rights.* (1) The Contractor shall notify the Contracting Officer of the Contractor's or its potential subcontractor's use in the performance of the contract or subcontract of items, components, processes and computer software that—

(i) Have been developed exclusively at private expense;

(ii) Have been developed in part at private expense; or

(iii) Embody technology that has been developed exclusively with Government funds which the Contractor or subcontractor

desires exclusive rights to commercialize, with Government approval.

(2) With respect to each item, component, process, or computer software identified in (j)(1)(ii) above, the Contractor shall also notify the Contracting Officer of the total development cost known to the Contractor of the item, component, process, or computer software and the percentage of the total development cost known to the Contractor which was contributed by the Contractor.

(3) Such notification is not required with respect to items, components, processes or computer software for which such notice was given pursuant to preaward notification of rights in technical data in connection with this contract.

(4) Such notification shall be accompanied by the appropriate listing and certification required by the clause at DFARS 252.227-7038.

(k) *Identification of restrictions on Government rights.* Technical data and computer software shall not be tendered to the Government with other than unlimited rights, unless the technical data or computer software are contained in a listing made part of this contract. This listing is intended to facilitate acceptance of the technical data and computer software by the Government and does not change, waive, or otherwise modify the rights or obligations of the parties under the clause at DFARS 252.227-7037. As a minimum, this listing must—

(1) Identify the items, components, processes, or computer software to which the restrictions on the Government apply;

(2) Identify or describe the technical data or computer software subject to other than unlimited rights; and

(3) Identify or describe, as appropriate, the category or categories of Government rights, the agreed-to time limitations, or any special restrictions on the use of disclosure of the technical data or computer software.

(1) *Postaward Negotiation—Disputes.* If, after exhausting all reasonable efforts, the parties fail to agree on the apportionment of the rights in technical data furnished under this contract by the date established in the contract for agreement, or within any extension established by the Contracting Officer, then the Contracting Officer may establish the respective data rights of the parties, subject to Contractor appeal as provided in the Disputes clause. In any event, the Contractor shall proceed with completion of the contract.

(End of clause)

Alternate I (APR 1988)

As prescribed at 227.475-8, add the following paragraph to the basic clause:

(m) *Publication for sale.* If, prior to publication for sale by the Government and within the period designated in the contract or task order, but in no event later than twenty-four (24) months after delivery of such data, the Contractor publishes for sale any data (1) designated in the contract as being subject to this paragraph and (2) delivered under this contract, and promptly notifies the Contracting Officer of these publications, the Government shall not publish such data for sale or authorize others to do so. This limitation on the Government's right to publish for sale any such data so published

by the Contractor shall continue as long as the data is protected as a published work under the copyright law of the United States and is reasonably available to the public for purchase. Any such publication shall include a notice identifying this contract and recognizing the license rights of the Government under this clause. As to all such data not so published by the Contractor, this paragraph shall be of no force or effect.

Alternate II (APR 1988)

As prescribed at 227.479(d), substitute the following paragraphs (b) and (c) for the existing paragraphs (b) and (c) in the basic clause.

(b) *Rights in Technical Data—(1) Unlimited Rights.* The Government is entitled to and will receive unlimited rights in:

(i) Form, fit, and function data pertaining to items, components, or processes prepared or required to be delivered under this or any other Government contract or subcontract;

(ii) Manuals or instructional materials (other than detailed manufacturing or process data) prepared or required to be delivered under this or any other contract or any subcontract hereunder necessary for installation, operation, maintenance, or training purposes;

(iii) Technical data prepared or required to be delivered under this or any other Government contract or subcontract and constituting corrections or changes to Government-furnished data; and

(iv) Technical data which is otherwise publicly available, or has been released or disclosed by the contractor or subcontractor, without restriction on further release or disclosure.

(2) *Limited Rights.* The Government shall have limited rights in:

(i) Unpublished technical data pertaining to items, components or processes developed exclusively at private expense, and unpublished computer software documentation related to computer software that is acquired with restricted rights, other than such data included in (b)(1) above. Limited rights shall be effective provided that only the portion or portions of each piece of data to which limited rights are to be asserted are identified (for example, by circling, underscoring, or a note), and that the piece of data is marked with the legend below containing:

(A) The number of the prime contract under which the technical data is to be delivered; and

(B) The name of the Contractor and/or any subcontractor asserting limited rights.

Limited Rights Legend

Contract No. _____
Contractor: _____

The restrictions governing the use of technical data marked with this legend are set forth in the definition of "Limited Rights" in DFARS clause at 252.227-7013. This legend, together with the indications of the portions of this data, shall be included on any reproduction hereof which includes any part of the portions subject to limited rights. The limited rights legend shall be honored only as

long as the data continues to meet the definition of limited rights.

(3) *Government Purpose License Rights.* For a period of two (2) years (or such other period as may be authorized by the Contracting Officer for good cause shown) after the delivery and acceptance of the last deliverable item under the contract, the Government shall have limited rights and, after the expiration of the two-year period, shall have Government purpose license rights in any technical data prepared or required to be delivered under this contract or subcontract hereunder, which is not otherwise subject to unlimited or limited rights pursuant to subparagraph (b)(1) or (b)(2) above. The Government shall not be liable for unauthorized use or disclosure of the data by third parties. Government Purpose License Rights shall be effective provided that only the portion or portions of each piece of data to which such rights are to be asserted are identified (for example, by circling, underscoring, or a note), and that the piece of data is marked with the legend below:

(A) The number of the prime contract under which the technical data is to be delivered; and

(B) The name of the contractor and/or any subcontractor asserting Government Purpose License Rights.

Government Purpose License Rights (SBIR Program)

Contract No. _____
Contractor: _____

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For a period of two (2) years after delivery and acceptance of the last deliverable item under the above contract, this technical data shall be subject to the restrictions contained in the definition of "Limited Rights" in DFARS clause at 252.227-7013. After the two-year period, the data shall be subject to the restrictions contained in the definition of "Government Purpose License Rights" in DFARS clause at 252.227-7013. The Government assumes no liability for unauthorized use or disclosure by others. This legend, together with the indications of the portions of the data which are subject to such limitations, shall be included on any reproduction hereof which contains any portions subject to such limitations and shall be honored only as long as the data continues to meet the definition on Government purpose license rights.

(c) *Rights in Computer Software—(1) Restricted Rights.* (i) The Government shall have restricted rights in computer software, listed or described in a license agreement made a part of this contract, which the parties have agreed will be furnished with restricted rights. Notwithstanding any contrary provision in any such license agreement, the Government shall have the rights included in the definition of "restricted rights" in paragraph (a)(17) above. Unless the computer software is marked by the Contractor with the following legend:

Restricted Rights Legend

Use, duplication or disclosure is subject to restrictions stated in Contract No. _____

with (Name of Contractor)
And the related computer software documentation includes a prominent statement of the restrictions applicable to the computer software. The Government shall have unlimited rights in the software. The Contractor may not place any legend on computer software indicating restrictions on the Government's rights in such software unless the restrictions are set forth in a license agreement made a part of this contract prior to the delivery date of the software. Failure of the Contractor to apply a restricted rights legend to such computer software shall relieve the Government of liability with respect to this unmarked software.

(ii) Notwithstanding subparagraph (c)(1)(i) above, commercial computer software and related documentation developed at private expense and not in public domain may be marked with the following legend:

Restricted Rights Legend

Use, duplication, or disclosure by the Government is subject to restrictions as set forth in subparagraph (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at DFARS 252.227-7013.

(Name of Contractor and Address)

When acquired by the Government, commercial computer software and related documentation so legended shall be subject to the following:

(A) Title to and ownership of the software and documentation shall remain with the Contractor.

(B) User of the software and documentation shall be limited to the facility for which it is acquired.

(C) The Government shall not provide or otherwise make available the software or documentation, or any portion thereof, in any form, to any third party without the prior written approval of the Contractor. Third parties do not include prime contractors, subcontractors and agents of the Government who have the Government's permission to use the licensed software and documentation at the facility, and who have agreed to use the licensed software and documentation only in accordance with these restrictions. This provision does not limit the right of the Government to use software, documentation, or information therein, which the Government has or may obtain without restrictions.

(D) The Government shall have the right to use the computer software and documentation with the computer for which it is acquired at any other facility to which that computer may be transferred; to use the computer software and documentation with a backup computer when the primary computer is inoperative; to copy computer programs for safekeeping (archives) or backup purposes; and to modify the software and documentation or combine it with other software. *Provided*, that the unmodified portions shall remain subject to these restrictions.

(2) Government Purpose License Rights. For a period of two (2) years (or such other period as may be authorized by the Contracting Officer for good cause shown) after the delivery and acceptance of the last

deliverable item under the contract, the Government shall have restricted rights and, after expiration of the two-year period, shall have Government purpose license rights in:

(i) Computer software resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any Government contract or subcontract;

(ii) Computer software required to be originated or developed under a Government contract, or generated as a necessary part of performing a contract; and

(iii) Any other computer software required to be prepared or delivered under this contract or subcontract hereunder, which is not otherwise subject to restricted or unlimited rights pursuant to subparagraph (c)(1) or (c)(3) herein. Government purpose license rights shall be effective provided that each unit of software is marked with an abbreviated license rights legend reciting that the use, duplication, or disclosure of the software is subject to the same restrictions included in the same contract (identified by number) with the same contractor (identified by name). The Government assumes no liability for unauthorized use, duplication, or disclosure by others.

(3) *Unlimited Rights*. The Government shall have unlimited rights in:

(i) Computer software required to be prepared or delivered under this or any subcontract hereunder that was previously delivered or previously required to be delivered to the Government under any contract or subcontract with unlimited rights;

(ii) Computer software that is publicly available or has been or is normally released or disclosed by the Contractor without restriction on further use or disclosure; and

(iii) Computer data bases, consisting of information supplied by the Government, information in which the Government has unlimited rights, or information which is in the public domain.

252.227-7014 (Reserved)

252.227-7015 (Reserved)

252.227-7016 (Reserved) FORMEX

252.227-7017 (Reserved) CLAUSES DELETED

252.227-7018 Restrictive markings on technical data.

As prescribed at 227.473-3(a), insert the following clause:

Restrictive Markings on Technical Data (APR 1988)

(a) The Contractor shall have, maintain, and follow throughout the performance of this contract, written procedures sufficient to assure that restrictive markings are used only when authorized by the terms of the "Rights in Technical Data and Computer Software" clause of this contract. The Contractor shall also maintain a quality assurance system to assure compliance with this clause.

(b) As part of the procedures, the Contractor shall as a minimum:

(1) Maintain records to show how the procedures of paragraph (a) above were applied in determining that the markings are authorized;

(2) Maintain records sufficient to justify the validity of any restrictive markings on technical data delivered under this contract;

(3) Provide for review of subcontractor procedures for controlling the restrictive markings on technical data. Where appropriate, the Contractor may request Government assistance in evaluating subcontractor procedures; and

(4) Establish and maintain operating procedures and physical security designed to protect any technical data subject to other than unlimited rights from inadvertent or unauthorized marking, disclosure or release to third parties.

(c) The Contractor shall, within sixty (60) days after award of this contract, identify in writing to the Contracting Officer by name or title the person(s) having the final responsibility within Contractor's organization for determining whether restrictive markings are to be placed on technical data to be delivered under this contract. The Government is authorized to contact such person(s) to resolve questions involving restrictive markings.

(d) The Contracting Officer may evaluate, verify and obtain a copy of the Contractor's procedures. The failure of the Contracting Officer to evaluate or verify such procedures shall not relieve the Contractor of the responsibility for complying with paragraphs (a) and (b) above.

(e) If the Contracting Officer gives written notification of any failure to maintain or follow the established procedures, or of any 10794

deficiency in the procedures, corrective action shall be accomplished within the time specified by the Contracting Officer.

(f) This clause shall be included in each subcontract under which technical data is required to be delivered. When so inserted, "Contractor" shall be changed to "Subcontractor".

(End of clause)

252.227-7019 Identification of restricted rights computer software. *

As prescribed at 227.481, insert the following provision:

Identification of Restricted Rights Computer Software (APR 1988)

The Offeror is required to identify in his proposal, to the extent feasible, any such computer software which was developed at private expense and upon the use of which it desires to negotiate restrictions, and to state the nature of the proposed restrictions. Any restrictions on the Government's use or disclosure of computer software developed at private expense and to be delivered under the contract must be set forth in an agreement made a part of the contract, either negotiated prior to award or included in a modification of the contract before such delivery. If no such computer software is identified, all deliverable computer software will be subject to unlimited rights.

(End of provision)

252.227-7020 Rights in data—special works.

As prescribed at 227.476(a), insert the following clause:

Rights in Data—Special Works (MAR 1979)

(a) The term "works" as used herein includes literary, musical, and dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and works of similar nature. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) All works first produced in the performance of this contract shall be the sole property of the Government, which shall be considered the "person for whom the work was prepared" for the purpose of authorship in any copyrightable work under 17 U.S.C. 201(b), and the Government shall own all of the rights comprised in the copyright. The Contractor agrees not to assert or authorize others to assert any rights, or establish any claim to copyright, in such works. The Contractor, unless directed to the contrary by the Contracting Officer, shall place on any such works delivered under this contract the following notice:

© (Year date of delivery) United States Government as represented by the Secretary of (department). All rights reserved.

In the case of a phonorecord, the © will be replaced by P.

(c) Except as otherwise provided in this contract, the Contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world (1) to reproduce in copies or phonorecords, to prepare derivative works, to distribute copies or phonorecords, and to perform or display publicly any portion of a work which is not first produced in the performance of this contract but in which copyright is owned by the Contractor and which is incorporated in the work furnished under this contract, and (2) to authorize others to do so for Government purposes.

(d) Unless written approval of the Contracting Officer is obtained, the Contractor shall not include in any works prepared for or delivered to the Government under this contract any works of authorship in which copyright is not owned by the Contractor or the Government without acquiring for the Government any rights necessary to perfect a license of the scope set forth in paragraph (c) above.

(e) The Contractor shall indemnify and save and hold harmless the Government, and its officers, agents and employees acting for the Government, against any liability, including costs and expenses, (1) for violation of proprietary rights, copyrights, or rights of privacy or publicity, arising out of the creation, delivery, or use of any works furnished under this contract, or (2) based upon any libelous or other unlawful matter contained in such works.

(f) Nothing contained in this clause shall imply a license to the Government under any patent, or be construed as affecting the scope of any license of other right otherwise granted to the Government under any patent.

(g) Paragraphs (c) and (d) above are not applicable to material furnished to the Contractor by the Government and incorporated in the work furnished under the contract; *Provided*, such incorporated material is identified by the Contractor at the

time of delivery of such work.

(End of clause)

252.227-7021 Rights in data—existing works.

As prescribed at 227.477(b), insert the following clause:

Rights in Data—Existing Works (MAR 1979)

(a) The term "works" as used herein includes literary, musical, and dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and works of a similar nature. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) Except as otherwise provided in this contract, the Contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world (1) to distribute, perform publicly, and display publicly the works called for under this contract and (2) to authorize others to do so for Government purposes.

(c) The Contractor shall indemnify and save and hold harmless the Government, and its officers, agents, and employees acting for the Government, against any liability, including costs and expenses, (1) for violation of proprietary rights, copyrights, or rights of privacy or publicity arising out of the creation, delivery, or use, of any works furnished under this contract, or (2) based upon any libelous or other unlawful matter contained in same works.

(End of clause)

252.227-7022 Government rights (unlimited).

As prescribed at 227.478-2(a)(1)(i), insert the following clause:

Government Rights (Unlimited) (MAR 1979)

The Government shall have unlimited rights, in all drawings, designs, specifications, notes and other works developed in the performance of this contract, including the right to use same on any other Government design or construction without additional compensation to the Contractor. The Contractor hereby grants to the Government a paid-up license throughout the world to all such works to which he may assert or establish any claim under design patent or copyright laws. The Contractor for a period of three (3) years after completion of the project agrees to furnish the original or copies of all such works on the request of the Contracting Officer.

(End of clause)

252.227-7023 Drawings and other data to become property of Government.

As prescribed at 227.478-2(a)(1)(ii), insert the following clause:

Drawings and Other Data to Become Property of Government (MAR 1979)

All designs, drawings, specifications, notes and other works developed in the performance of this contract shall become the sole property of the Government and may be

used on any other design or construction without additional compensation to the Contractor. The Government shall be considered the "person for whom the work was prepared" for the purpose of authorship in any copyrightable work under 17 U.S.C. 201(b). With respect thereto, the Contractor agrees not to assert or authorize others to assert any rights nor establish any claim under the design patent or copyright laws. The Contractor for a period of three (3) years after completion of the project agrees to furnish all retained works on the request of the Contracting Officer. Unless otherwise provided in this contract, the Contractor shall have the right to retain copies of all works beyond such period.

(End of clause)

252.227-7024 Notice and approval of restricted designs.

As prescribed at 227.478-5, insert the following clause:

Notice and Approval of Restricted Designs (APR 1984)

In the performance of this contract, the Contractor shall, to the extent practicable, make maximum use of structures, machines, products, materials, construction methods, and equipment that are readily available through Government or competitive commercial channels, or through standard or

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proven production techniques, methods, and processes. Unless approved by the Contracting Officer, the Contractor shall not produce a design or specification that requires in this construction work the use of structures, products, materials, construction equipment, or processes that are known by the Contractor to be available only from a sole source. The Contractor shall promptly report any such design or specification to the Contracting Officer and give the reason why it is considered necessary to so restrict the design or specification.

(End of clause)

252.227-7025 [Reserved] *SBIR PROGRAM CLAUSE DELETED***252.227-7026 Deferred delivery of technical data or computer software.**

As prescribed at 227.475-2(b), insert the following clause:

Deferred Delivery of Technical Data or Computer Software (APR 1988)

The Government shall have the right to require, at any time during the performance of this contract, within two (2) years after either acceptance of all items (other than data or computer software) to be delivered under this contract or termination of this contract, whichever is later, delivery of any technical data or computer software item identified in this contract as "deferred delivery" data or computer software. The obligation to furnish such technical data required to be prepared by a subcontractor and pertaining to an item obtained from him shall expire two (2) years after the date Contractor accepts the last delivery of that item from that subcontractor for use in performing this contract.

(End of clause)

252.227-7027 Deferred ordering of technical data or computer software.

As prescribed at 227.475-2(c), insert the following clause:

Deferred Ordering of Technical Data or Computer Software (APR 1988)

In addition to technical data or computer software specified elsewhere in this contract to be delivered hereunder, the Government may, at any time during the performance of this contract or within a period of three (3) years after acceptance of all items (other than technical data or computer software) to be delivered under this contract or the termination of this contract, order any technical data or computer software generated in the performance of this contract or any subcontract hereunder. When the technical data or computer software is ordered, the Contractor shall be compensated for converting the data or computer software into the prescribed form, for reproduction and delivery. The obligation to deliver the technical data of a subcontractor and pertaining to an item obtained from him shall expire three (3) years after the date the Contractor accepts the last delivery of that item from that subcontractor under this contract. The Government's rights to use said data or computer software shall be pursuant to the "Rights in Technical Data and Computer Software" clause of this contract. (End of clause)

252.227-7028 Requirement for technical data certification.

As prescribed at 227.473-4(a), insert the following provision:

Requirement for Technical Data Certification (APR 1988)

The Offeror shall submit with its offer a certification as to whether the Offeror has delivered or is obligated to deliver to the Government under any contract or subcontract the same or substantially the same technical data with other than unlimited rights included in its offer; if so, the Offeror shall identify:

(a) One existing contract or subcontract under which the technical data were delivered or will be delivered, and the place of delivery; and

(b) The limitation on the Government's right to use the data, including identification of the earliest date the limitation expires. (End of provision)

252.227-7029 Identification of technical data.

As prescribed at 227.473-3(a), insert the following clause:

Identification of Technical Data (MAR 1975)

Technical data delivered under this contract shall be marked with the number of this contract, name of Contractor, and name of any subcontractor who generated the data. (End of clause)

252.227-7030 Technical data—withholding of payment.

As prescribed at 227.473-5(b), insert the following clause:

Technical Data—Withholding of Payment (APR 1988)

(a) If technical data specified to be delivered under this contract, is not delivered within the time specified by this contract or is deficient upon delivery (including having restrictive markings not specifically authorized by this contract), the Contracting Officer may until such data is accepted by the Government, withhold payment to the Contractor of ten percent (10%) of the total contract price or amount unless a lesser withholding is specified in the contract. Payments shall not be withheld nor any other action taken pursuant to this paragraph when the Contractor's failure to make timely delivery or to deliver such data without deficiencies arises out of causes beyond the control and without the fault or negligence of the Contractor.

(b) After payments total ninety percent (90%) of the total contract price or amount and if all technical data specified to be delivered under this contract has not been accepted, the Contracting Officer may withhold from further payment such sum as the Contracting Officer considers appropriate, unless a lesser withholding limit is specified in the contract.

(c) The withholding of any amount or subsequent payment to the Contractor shall not be construed as a waiver of any rights accruing to the Government under this contract. (End of clause)

252.227-7031 Data requirements.

As prescribed at 227.475-1, insert the following clause:

Data Requirements (APR 1988)

The Contractor is required to deliver the data items listed on the DD Form 1423 (Contract Data Requirements List) and data items identified in and deliverable under any contract clause of FAR Subpart 52.2 and DoD FAR Supplement Subpart 252.2 made a part of the contract. (End of clause)

252.227-7032 Rights in technical data and computer software (Foreign).

As prescribed in 227.475-5, insert the following clause:

Rights in Technical Data and Computer Software (Foreign) (JUN 1975)

The United States Government may duplicate, use, and disclose in any manner for any purposes whatsoever, including delivery to other governments for the furtherance of mutual defense of the United States Government and other governments, all technical data including reports, drawings and blueprints, and all computer software, specified to be delivered by the Contractor to the United States Government under this contract. (End of clause)

252.227-7033 Rights in shop drawings.

As prescribed at 227.478-2(a)(2), insert the following clause:

Rights in Shop Drawings (APR 1966)

(a) Shop drawings for construction means drawings, submitted to the Government by the Construction Contractor, subcontractor or any lower-tier subcontractor pursuant to a construction contract, showing in detail (i) the proposed fabrication and assembly of structural elements and (ii) the installation (i.e., form, fit, and attachment details) of materials or equipment. The Government may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

(b) This clause, including this paragraph (b), shall be included in all subcontracts hereunder at any tier.

(End of clause)

252.227-7034 Patents—subcontracts.

As prescribed at 227.304-4, insert the following clause:

Patents—Subcontracts (APR 1984)

The Contractor shall include the clause at FAR 52.227-1, Patent Rights—Retention by the Contractor (g Form), suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental, or research work to be performed by other than a small business firm or nonprofit organization. (End of clause)

10796**252.227-7035 Preaward notification of rights in technical data and computer software.**

As prescribed at 227.473-1(a)(2), insert the following provision:

Preaward Notification of Rights in Technical Data and Computer Software (APR 1988)

(a) The Offeror shall in its response to this solicitation, notify the Contracting Officer of the Offeror's or its potential subcontractor's proposed use of items, components, processes and computer software in the performance of the contract that—

(1) Have been developed exclusively at private expense;

(2) Have been developed in part at private expense; or

(3) Embody technologies that have been developed exclusively with Government funds which the Contractor or subcontractor requests the Government to grant commercial exclusive rights.

(b) With respect to each item, component, process, or computer software identified in (a)(ii) above, the Contractor shall also notify the Contracting Officer of the total development cost known to the Contractor of the item, component, process, or computer software and the percentage of the total development cost known to the Contractor which was contributed by the Contractor. This notification shall be accompanied by the appropriate certification at DFARS 252.227-7038.

(c) If the Offeror asserts other than unlimited rights to any technical data in its proposal responding to this requirement, Government failure to object to or reject any such assertion shall not be construed to constitute agreement to any such data rights

assertion. Offerors will furnish, at the written request of the Contracting Officer, evidence to support any such assertion. Such notification shall be accompanied by the appropriate certification at DFARS 252.227-7038.

(End of provision)

252.227-7036 Certification of technical data conformity.

As prescribed at 227.473-5, insert the following clause:

Certification of Technical Data Conformity (MAY 1987)

(a) All technical data delivered under this contract shall be accompanied by the following written certification:

The Contractor, _____, hereby certifies that, to the best of its knowledge and belief, the technical data delivered herewith under Contract No. _____ is complete, accurate, and complies with all requirements of the contract.

Date _____
Name and Title of Certifying Official _____

This written certification shall be dated and the certifying official (identified by name and title) shall be duly authorized to bind the Contractor by the certification.

(b) The Contractor shall identify, by name and title, each individual (official) authorized by the Contractor to certify in writing that the technical data is complete, accurate, and complies with all requirements of the contract. The Contractor hereby authorizes direct contact with the authorized individual responsible for certification of technical data. The authorized individual shall be familiar with the Contractor's technical data conformity procedures and their application to the technical data to be certified and delivered.

(c) Technical data delivered under this contract may be subject to reviews by the Government during preparation and prior to acceptance. Technical data is also subject to reviews by the Government subsequent to acceptance. Such reviews may be conducted as a function ancillary to other reviews, such as in-process reviews or configuration audit reviews.

(End of clause)

252.227-7037 Validation of restrictive markings on technical data.

As prescribed in 227.473-4(a) insert the following clause:

Validation of Restrictive Markings on Technical Data (APR 1988)

(a) *Definitions.* The terms used in this clause are defined in the clause at DFARS 252.227-7013 of the Department of Defense Federal Acquisition Regulation Supplement (DFARS).

(b) *Justification.* The Contractor or subcontractor at any tier is responsible for maintaining records sufficient to justify the validity of its markings that impose restrictions on the Government and others to use, duplicate, or disclose technical data delivered or required to be delivered under the contract or subcontract, and shall be prepared to furnish to the Contracting Officer a written justification for such restrictive

markings in response to a challenge under paragraph (d) below.

(c) *Prechallenge Request for Information.*

(1) The Contracting Officer may request the Contractor or subcontractor to furnish a written explanation for any restriction asserted by the Contractor or subcontractor on the right of the United States or others to use technical data. If, upon review of the explanation submitted, the Contracting Officer remains unable to ascertain the basis of the restrictive marking, the Contracting Officer may further request the Contractor or subcontractor to furnish additional information in the records of, or otherwise in the possession of or reasonably available to, the Contractor or subcontractor to justify the validity of any restrictive marking on technical data delivered or to be delivered under the contract or subcontract (e.g., a statement of facts accompanied with supporting documentation). The Contractor or subcontractor shall submit such written data as requested by the Contracting Officer within the time required or such longer period as may be mutually agreed.

(2) If the Contracting Officer, after reviewing the written data furnished pursuant to paragraph (c)(1) above, or any other available information pertaining to the validity of a restrictive marking, determines that reasonable grounds exist to question the current validity of the marking and that continued adherence to the marking would make impracticable the subsequent competitive acquisition of the item, component, or process to which the technical data relates, the Contracting Officer shall follow the procedures in (d) below.

(3) If the Contractor or subcontractor fails to respond to the Contracting Officer's request for information under paragraph (c)(1) above, and the Contracting Officer determines that continued adherence to the marking would make impracticable the subsequent competitive acquisition of the item, component, or process to which the technical data relates, the Contracting Officer may challenge the validity of the marking as described in paragraph (d) below.

(d) *Challenge.* (1) Notwithstanding any provision of this contract concerning inspection and acceptance, if the Contracting Officer determines that a challenge to the restrictive marking is warranted, the Contracting Officer shall send a written challenge notice to the Contractor or subcontractor asserting the restrictive markings. Such challenge shall:

- (i) State the specific grounds for challenging the asserted restriction;
- (ii) Require a response within sixty (60) days justifying and providing sufficient evidence as to the current validity of the asserted restriction; and
- (iii) State that a DoD Contracting Officer's final decision, issued pursuant to paragraph (f) below, sustaining the validity of a restrictive marking identical to the asserted restriction, within the three-year period preceding the challenge, shall serve as justification for the asserted restriction if the validated restriction was asserted by the same Contractor or subcontractor (or any licensee of such Contractor or subcontractor)

to which such notice is being provided.

(iv) State that failure to respond to the challenge notice may result in issuance of a final decision pursuant to paragraph (e) below.

(2) The Contracting Officer shall extend the time for response as appropriate if the Contractor or subcontractor submits a written request showing the need for additional time to prepare a response.

(3) The Contractor's or subcontractor's written response shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601 *et seq.*), and shall be certified in the form prescribed by FAR 33.207, regardless of dollar amount.

(4) A Contractor or subcontractor receiving challenges to the same restrictive markings from more than one Contracting Officer shall notify each Contracting Officer of the existence of more than one challenge. The notice shall also state which Contracting Officer initiated the first in time unanswered challenge. The Contracting Officer initiating the first in time unanswered challenge after consultation with the Contractor or subcontractor and the other Contracting Officers, shall formulate and distribute a schedule for responding to each of the challenge notices to all interested parties. The schedule shall afford the Contractor or subcontractor an opportunity to respond to each challenge notice. All parties will be bound by this schedule.

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(e) *Final Decision When Contractor or Subcontractor Fails to Respond.* Upon a failure of a Contractor or subcontractor to submit any response to the challenge notice, the Contracting Officer will issue a final decision to the Contractor or subcontractor in accordance with the Disputes clause at FAR 52.233-1, pertaining to the validity of the asserted restriction. This final decision shall be issued as soon as possible after the expiration of the time period of paragraph (d)(1)(ii) or (d)(2) above. Following the issuance of the final decision, the Contracting Officer will comply with the procedures in (f)(2)(ii) through (iv) below.

(f) *Final Decision When Contractor or Subcontractor Responds.* (1) If the Contracting Officer determines that the Contractor or subcontractor has justified the validity of the restrictive marking, the Contracting Officer shall issue a final decision to the Contractor or subcontractor sustaining the validity of the restrictive marking, and stating that the Government will continue to be bound by the restrictive marking. This final decision shall be issued within sixty (60) days after receipt of the Contractor's or subcontractor's response to the challenge notice, or within such longer period that the Contracting Officer has notified the Contractor or subcontractor that the Government will require. The notification of a longer period for issuance of a final decision will be made within sixty (60) days after receipt of the response to the challenge notice.

(2)(i) If the Contracting Officer determines that the validity of the restrictive marking is not justified, the Contracting Officer shall issue a final decision to the Contractor or

subcontractor in accordance with the Disputes clause at FAR 52.233-1. Notwithstanding paragraph (e) of the Disputes clause, the final decision shall be issued within sixty (60) days after receipt of the Contractor's or subcontractor's response to the challenge notice, or within such longer period that the Contracting Officer has notified the Contractor or subcontractor of the longer period that the Government will require. The notification of a longer period for issuance of a final decision will be made within sixty (60) days after receipt of the response to the challenge notice.

(ii) The Government agrees that it will continue to be bound by the restrictive marking for a period of ninety (90) days from the issuance of the Contracting Officer's final decision under paragraph (f)(2)(i) of this clause. The Contractor or subcontractor agrees that, if it intends to file suit in the United States Claims Court it will provide a notice of intent to file suit to the Contracting Officer within ninety (90) days from the issuance of the Contracting Officer's final decision under paragraph (f)(2)(i) of this clause. If the Contractor or subcontractor fails to appeal, file suit, or provide a notice of intent to file suit to the Contracting Officer within the ninety (90)-day period, the Government may cancel or ignore the restrictive markings, and the failure of the Contractor or subcontractor to take the required action constitutes agreement with such Government action.

(iii) The Government agrees that it will continue to be bound by the restrictive marking where a notice of intent to file suit in the United States Claims Court is provided to the Contracting Officer within ninety (90) days from the issuance of the final decision under paragraph (f)(2)(i) of this clause. The Government will no longer be bound, and the Contractor or subcontractor agrees that the Government may strike or ignore the restrictive markings, if the Contractor or subcontractor fails to file its suit within one (1) year after issuance of the final decision. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, that urgent or compelling circumstances will not permit waiting for the filing of a suit in the United States Claims Court, the Contractor or subcontractor agrees that the agency may, following notice to the Contractor or subcontractor, authorize release or disclosure of the technical data. Such agency determination may be made at any time after issuance of the final decision and will not affect the Contractor's or subcontractor's right to damages against the United States where its restrictive markings are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(iv) The Government agrees that it will be bound by the restrictive marking where an appeal or suit is filed pursuant to the Contract Disputes Act until final disposition by an agency Board of Contract Appeals or the United States Claims Court. Notwithstanding the foregoing, where the head of an agency determines, on a nondelegable basis, following notice to the Contractor that urgent or compelling circumstances will not permit waiting the decision by such Board of Contract Appeals or the United States Claims Court, the Contractor or subcontractor agrees that the

agency may authorize release or disclosure of the technical data. Such agency determination may be made at any time after issuance of the final decision and will not affect the Contractor's or subcontractor's right to damages against the United States where its restrictive markings are ultimately upheld or to pursue other relief, if any, as may be provided by law.

(g) *Final Disposition of Appeal or Suit.* (1) If the Contractor or subcontractor appeals or files suit and if, upon final disposition of the appeal or suit, the Contracting Officer's decision is sustained—

(i) The restrictive marking on the technical data shall be cancelled, corrected or ignored; and

(ii) If the restrictive marking is found not to be substantially justified, the Contractor or subcontractor, as appropriate, shall be liable to the Government for payment of the cost to the Government of reviewing the restrictive marking and the fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Government in challenging the marking, unless special circumstances would make such payment unjust.

(2) If the Contractor or subcontractor appeals or files suit and if, upon final disposition of the appeal or suit, the Contracting Officer's decision is not sustained—

(i) The Government shall continue to be bound by the restrictive marking; and

(ii) The Government shall be liable to the Contractor or subcontractor for payment of fees and other expenses (as defined in 28 U.S.C. 2412(d)(2)(A)) incurred by the Contractor or subcontractor in defending the marking, if the challenge by the Government is found not to have been made in good faith.

(h) *Duration of Right to Challenge.* The Government may review the validity of any restriction on technical data, delivered or to be delivered under a contract, asserted by the Contractor or subcontractor. During the period within three (3) years of final payment on a contract or within three (3) years of delivery of the technical data to the Government, whichever is later, the Contracting Officer may review and make a written determination to challenge the restriction. The Government may, however, challenge a restriction on the release, disclosure or use of technical data at any time if such technical data (1) is publicly available; (2) has been furnished to the United States without restriction; or (3) has been otherwise made available without restriction. Only the Contracting Officer's final decision resolving a formal challenge by sustaining the validity of a restrictive marking constitutes "validation" as addressed in 10 U.S.C. 2321. A decision by the Government, or a determination by the Contracting Officer, to not challenge the restrictive marking or asserted restriction shall not constitute "validation".

(i) *Privy of Contract.* The Contractor or subcontractor agrees that the Contracting Officer may transact matters under this clause directly with subcontractors at any tier that assert restrictive markings. However, this clause neither creates nor implies privy of contract between the Government and subcontractors.

(j) *Flowdown.* The Contractor or subcontractor agrees to insert this clause in subcontracts at any tier requiring the delivery of technical data.

(End of clause)

252.227-7038 Listing and certification of development of technology with private funding.

As prescribed at 227.473-1(a)(4), insert the following provision:

Listing and Certification of Development of Technology With Private Funding (APR 1988)

(a) All technical data pertaining to the items, components, processes, and computer software identified on the listing attached to this certification shall be subject to the written certification below. Upon request by the Contracting Officer, the Contractor shall provide sufficient descriptive information to enable the Contracting Officer to identify and evaluate the Contractor's assertions.

Certification of Development of Technology With Private Funding

(1) The Offeror/Contractor certifies that, to the best of its knowledge and belief, the following information is current, accurate and complete:

(i) Identification of items, components, processes and computer software which the Offeror/Contractor intends to use in the performance of the contract which were developed exclusively at private expense if

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the unpublished technical data pertaining thereto will be delivered to the Government marked with other than unlimited rights.

(ii) Identification of items, components, processes and computer software which the Offeror/Contractor intends to use in the performance of the contract which were developed in part at private expense if the unpublished technical data pertaining thereto will be delivered to the Government marked with other than unlimited rights.

(iii) Development cost contributed by the Offeror/Contractor for each item, component, process, and computer software identified in (a)(1)(ii) above.

(iv) Percentage of total development cost known to the Offeror/Contractor contributed by the Offeror/Contractor for each item, component, process and computer software identified in (a)(1)(ii) above.

(2) Except for technical data pertaining to items, components, processes, or computer software for which notice will be provided pursuant to DFARS 252.227-7013(j), all other technical data will be delivered to the Government subject to unlimited rights.

(3) Date _____
Name and Title of Certifying Official _____

This written certification shall be dated and the certifying official (identified by name and title) shall be duly authorized to bind the Contractor.

(End of certificate)

(End of provision)

[FR Doc. 88-7054 Filed 3-31-88; 8:45 am]

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808. Rights In Technical Data, of Pub. L. 100-180 which requires the Department of Defense to make certain revisions to DFARS Subpart 227.4 and Part 252. The statute provides that:

1. The terms "exclusively with Government funds" and "exclusively at private expense" be defined and that the definitions specify how indirect costs are to be treated.

2. A contractor or subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition for award, to refrain from offering to use, or from using, an item or process developed exclusively at private expense and to which the contractor or subcontractor is entitled to restrict the Government's rights.

3. The regulation may not impair the right of a contractor or subcontractor to receive from a third party a fee or royalty for the use of technical data pertaining to an item or process developed exclusively at private expense.

4. A contractor or subcontractor may be permitted to license directly the use of technical data which the contractor is otherwise allowed to restrict, if necessary to develop alternative sources of supply and manufacture.

5. The respective rights of the Government and of the contractor or subcontractor in technical data pertaining to an item or process developed in part with Government funds and in part at private expense must be established on the basis of negotiation, except where a determination is made that negotiations would not be practicable. Reasonable and flexible guidelines can be prescribed for the conduct of the negotiations, including negotiation objectives.

In addition to the regulatory changes required by section 808 of Pub. L. 100-180, the interim rule was drafted in consideration of Executive Order 12581, entitled: Facilitating Access to Science and Technology, issued on April 10, 1987.

The interim rule also addresses two issues raised by public comments. When the final rule implementing section 953 of Pub. L. 99-500 was published on April 16, 1987 (52 FR 12391), the DAR Council indicated that commercialization and non-disclosure agreements required additional consideration.

1. *Commercialization.* This interim rule provides additional procedures and criteria whereby a contractor may be granted exclusive commercial rights in technical data, while considering the public interest in obtaining access to the data and the administrative burden to the Government in protecting the

contractor's exclusive commercial interests.

2. (a) *Standard Non-Disclosure Agreements.* The interim rule contains a standard agreement which must be executed by a prospective recipient of Government Purpose License Rights (GPLR) data prior to release of the data to the concern.

(b) *Alternative Approach to Non-Disclosure Agreements.* The DAR Council is considering, and specifically requests public comment with respect to, an alternative approach to the use of non-disclosure agreements where data subject to GPLR are involved. Under this alternative approach, a solicitation provision would notify offerors that the solicitation includes technical data subject to restrictions on further use or disclosure, and would require offerors to safeguard the data. It is envisioned that the solicitation provision, together with the restrictive legends placed on the technical data, would sufficiently protect the contractor retaining exclusive commercial rights, and would adequately notify recipients of the solicitation of their responsibility to safeguard the data.

Finally, the interim rule was developed based on direction from the Deputy Assistant Secretary of Defense (Procurement) that DFARS Subpart 27.4 be simplified and streamlined.

B. Regulatory Flexibility Act Information

The interim rule may have a significant economic impact upon a substantial number of small entities, within the meaning of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.* An Initial Regulatory Flexibility Analysis has therefore been deemed necessary and will be provided to the Chief Counsel for Advocacy of the U.S. Small Business Administration. Interested parties desiring to obtain a copy of the Analysis may contact the individual listed above. Comments received from the public concerning the Analysis will be considered in drafting a final rule and in performing a Final Regulatory Flexibility Analysis.

Comments from small entities concerning the affected DFARS subparts will also be considered in accordance with section 610 of the Act. Such comments must be submitted separately and cite DAR Case 88-610 in correspondence.

C. Paperwork Reduction Act Information

The interim rule contains information collection requirements within the

meaning of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* Accordingly, an information collection clearance request has been submitted to OMB pursuant to 5 CFR 1320.13. Public comments concerning that request will be invited by OMB through a subsequent Federal Register notice.

List of Subjects in 48 CFR Parts 227 and 252

Government procurement.

Charles W. Lloyd,
Executive Secretary, Defense Acquisition
Regulatory Council.

Therefore, 48 CFR Parts 227 and 252 are amended as follows:

1. The authority citation for 48 CFR Parts 227 and 252 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DoD Directive 5000.35, and DoD FAR Supplement 201.301.

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PART 227—PATENTS, DATA, AND COPYRIGHTS

2. Subpart 227.4 is revised to read as follows.

Subpart 227.4—Technical Data, Other Data, Computer Software, and Copyrights

Sec.

- 227.470 Scope.
- 227.471 Definitions.
- 227.472 Acquisition policy for technical data and rights in technical data.
- 227.472-1 General.
- 227.472-2 Establishing minimum Government needs.
- 227.472-3 Rights in technical data.
- 227.473 General procedures.
- 227.473-1 Procedures for establishing rights in technical data.
- 227.473-2 Prohibitions.
- 227.473-3 Marking and identification requirements.
- 227.473-4 Validation of restrictive markings on technical data.
- 227.473-5 Remedies for noncomplying technical data.
- 227.473-6 [Reserved]
- 227.474 [Reserved]
- 227.475 Other procedures.
- 227.475-1 Data requirements.
- 227.475-2 Deferred delivery and deferred ordering.
- 227.475-3 Warranties of technical data.
- 227.475-4 Delivery of technical data to Foreign Governments.
- 227.475-5 Overseas contracts with Foreign Sources.
- 227.475-6 [Reserved]
- 227.475-7 [Reserved]
- 227.475-8 Publication for sale.
- 227.476 Special works.
- 227.477 Contracts for acquisition of existing works.
- 227.478 Architect-engineer and construction contracts.

or disclosure, and that the party asserting limited rights be notified by the contracting officer of such release, disclosure, or use; or

(b) Release or disclosure to a foreign government that is in the interest of the United States and is required for evaluational or informational purpose under the conditions of (a) above, except that the release or disclosure may not include detailed manufacturing or process data.

"Required as an Element of Performance Under a Government Contract or Subcontract", as used in this subpart, means, in connection with the development of an item, component, or process, that the development was specified in a Government contract or subcontract or that the development was necessary for performance of a Government contract or subcontract.

"Restricted rights", as used in this subpart, means rights that apply only to computer software, and include, as a minimum, the right to—

(a) Use computer software with the computer for which or with which it was acquired, including use at any Government installation to which the computer may be transferred by the Government;

(b) Use computer software with a backup computer if the computer for which or with which it was acquired is inoperative;

(c) Copy computer programs for safekeeping (archives) or backup purposes; and

(d) Modify computer software, or combine it with other software, subject to the provision that those portions of the derivative software incorporating restricted rights software are subject to the same restricted rights.

In addition, restricted rights include any other specific rights not inconsistent with the minimum rights in (a)-(d) above that are listed or described in a contract or described in a license agreement made a part of a contract.

"Technical data", as used in this subpart, means recorded information, regardless of the form or method of the recording of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information.

"Unlimited rights", as used in this subpart, means rights to use, duplicate, release, or disclose, technical data or computer software in whole or in part, in any manner and for any purpose whatsoever, and to have or permit others to do so.

"Unpublished", as used in this

subpart, means that technical data or computer software has not been released to the public or furnished to others without restriction on further use or disclosure. Delivery of other than unlimited rights technical data or computer software to or for the Government under a contract does not, in itself, constitute release to the public.

227.472 Acquisition policy for technical data and rights in technical data

227.472-1 General.

The acquisition of technical data and the rights to use that data requires a balancing of competing interests.

(a) *The Government's Interests.* The Government has extensive needs for many kinds of technical data and the rights to use such data. Its needs may exceed those of private commercial customers. Millions of separate items must be acquired, operated and maintained for defense purposes. Technical data are required for training of personnel, overhaul and repair, cataloging, standardization, inspection and quality control, packaging and logistics operations. Technical data resulting from research and development and production contracts must be disseminated to many different users. The Government must make its technical data widely available to increase competition, lower costs and provide for mobilization. Finally, the Government has an interest in encouraging contractors to develop new technologies and to improve existing technologies to satisfy Government and commercial needs. To encourage contractors and subcontractors to expend resources in developing applications of these technologies, it is ~~may be~~ appropriate to allow them to exclusively exploit the technology.

(b) *The Contractor's Interests.* Commercial and non-profit organizations have property rights and economic interests in technical data. Technical data are often closely held in the commercial sector because their disclosure to competitors could jeopardize the contractor's competitive advantage. Public disclosure can cause serious economic hardship to the originating company.

(c) *The Balancing of Interests.* (1) The Government's need for technical data and a contractor's economic interest in it do not necessarily coincide. However, they may coincide. This is true in the case of innovative contractors who can best be encouraged to develop items of military usefulness when their rights in such items are scrupulously protected.

(2) The Government needs to encourage delivery of data essential for

military needs, even though that data would not customarily be disclosed in commercial practice. When the Government pays for research and development, it has an obligation to foster technological progress through wide dissemination of the information and, where practicable, to provide competitive opportunities for other interested parties.

(3) Acquiring, maintaining, storing, retrieving, protecting and distributing technical data are costly and burdensome for the Government. Therefore, it is necessary to avoid acquisition of unnecessary technical data.

227.472-2 Establishing minimum Government needs in technical data and commercial software.

The Department of Defense shall obtain only the minimum essential technical data and data rights. In establishing the minimum Government needs, the following factors shall be

considered: Whether the item, component, or process will be competitively acquired; whether repair and overhaul work will be contracted out; whether the repair or replacement parts will be commercial items; or whether the item will be acquired by form, fit and function data, performance specifications, or by detailed design data. In deciding how to acquire data and data rights, the Department of Defense will use the least intrusive procedures in order to protect the contractor's economic interests (see Subpart 217.72).

227.472-3 Rights in technical data.

There are three basic types of rights which apply to technical data delivered under contract to the Government. These are unlimited rights, limited rights, and Government purpose license rights. The Government is entitled to unlimited rights in technical data as enumerated in (a)(1) below. The Government will obtain limited rights as discussed in (b)(1) below. Government purpose license rights may be established in accordance with (a)(2), (b)(2), or (c) below.

(a) *Unlimited Rights.* (1) The Government is entitled to and, except as provided in paragraph (a)(2), will receive unlimited rights in—

(i) Technical data pertaining to items, components, or processes which have been or will be developed exclusively with Government funds;

(ii) Technical data resulting directly from performance of experimental, developmental, or research work specified as an element of performance

including identification of the earliest expiration date for the limitation.

(ii) If pursuant to the preaward or postaward notification procedures the offeror/contractor notifies the Government that technical data or computer software may be delivered with other than unlimited rights, then the notice must be accompanied by the Certification at 252.227-7038, "Listing and Certification of Technology Developed with Private Funding."

(iii) This certification authorizes the contracting officer to request additional information needed to evaluate the assertions.

(iv) This certification assists the parties to negotiate rights in technical data and computer software to be delivered to the Government with other than unlimited rights, but does not alter the rights of the parties which are contained in the clause at 252.227-7037.

(b) *Establishing rights in technical data.* (1) *General.* The contracting officer shall review and evaluate assertions contained in preaward or postaward notifications to determine the likely impact on the Government's ability to meet its needs. The contracting officer shall then either—

- (i) Agree with the assertions;
- (ii) Enter into negotiations to establish the respective rights of the parties; or
- (iii) Determine that negotiations are not practicable, in which case the rights will be established in accordance with (d) below.

(2) *Negotiations.*—(i) *Negotiation factors.* The contracting officer shall consider the following factors when negotiating rights in technical data developed with mixed funding or when the Government negotiates to relinquish rights or to acquire greater rights:

(A) The acquisition strategy for the item or system (including logistics support);

(B) Whether the item or system (or related logistics support) will be competed;

(C) Timing of such competition;

(D) Whether the technology can be commercialized;

(E) Funding contributions of the respective parties;

(F) Development of alternative sources for industrial mobilization or other purposes;

(G) Burden on the Government of protecting the contractor's rights in technical data.

(ii) *Negotiation situations.* The following are examples of how the negotiation factors in (b)(2)(i) above may be applied:

(A) When the Government does not have an immediate need to use the data for competition and the contractor has not requested exclusive commercial

rights in the data, the Government will negotiate to establish limited rights which, upon expiration of a time limitation, shall become unlimited rights.

(B) Where the Government requires use of data for immediate competition, the contractor has requested exclusive commercial rights in the data (i.e., the data has commercial application), and protecting the contractor's rights is not unduly burdensome on the Government, the contracting officer will negotiate GPLR which will expire after a specified period of time and become unlimited rights.

(C) Where the Government requires immediate use of the data for competition and the contractor has no interest in commercializing the data, the Government may negotiate to obtain unlimited rights.

(iii) *Negotiation of time periods.* When time limitations for either GPLR or limited rights are negotiated, they shall be expressed in the contract as a date certain and should normally be no less than one year nor more than five years

after the estimated date of first production delivery to the Government of the item, component, process, or computer software to which the technical data pertains.

(A) The time limitations will be based on the following factors:

(1) Relative funding contribution of the parties;

(2) Anticipated date the technical data will be needed for competition;

(3) The economic life of the technology;

(4) The contractor's or subcontractor's agreement to establish or assist in establishing additional sources of supply;

(5) The burden on the Government in restricting disclosure;

(6) The potential commercial uses of the technology;

(B) Time limitations for GPLR and limited rights ~~greater than five years~~ may be negotiated to provide the contractor a reasonable opportunity to recover its private investment, if:

(1) The technical data will not be needed for competition; and

(2) Longer periods are approved by the chief of the contracting office.

(C) Time limitations for limited rights and GPLR may be extended, if:

(1) Other interested parties have not requested access to the technical data;

(2) The technical data need not be publicly disclosed to meet a specified Government need; and

(3) The contractor provides adequate consideration for remarking any technical data with revised legends.

(iv) *Non-standard license rights.* Unlimited rights, Government purpose license rights, and limited rights and combinations of these rights (i.e., with time limitations) are considered standard license rights. All other license rights are considered non-standard license rights and shall not be negotiated unless approved by the head of the contracting activity.

(c) *Contract documentation.*—(1) *Listing.* (i) The contracting officer shall incorporate into the contract a list of any items, components, processes, (and rights therein) to be delivered with other than unlimited rights.

(ii) During the life of the contract, a bilateral modification of the contract may be appropriate to incorporate the privately developed items, components, processes, or computer software identified by the contractor under the notification procedures. Also, during contract performance, changing conditions (e.g., schedule or cost) may require bilateral modification of the list.

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(iii) By the time the technical data are delivered to the Government, the list must—

(A) Identify the items components, processes, or computer software to which the technical data pertains;

(B) Identify or describe the technical data or computer software subject to other than unlimited rights; and

(C) Identify or describe, as appropriate, the category or categories of Government rights, the agreed-to time limitations, or any special restrictions on the use or disclosure of the technical data or computer software.

(2) *Standard Non-disclosure agreements.* (i) Technical data subject to other than unlimited rights shall not be released outside the Government unless the release is subject to a prohibition against further release, use, or disclosure. If the data is subject to GPLR, the recipient must sign the Standard Non-disclosure Agreement shown below. This Agreement must be executed by an official authorized to bind the contractor.

(ii) Nothing in this section impairs the rights of the developer of the data and third parties from independently entering into agreements concerning commercial uses of the data.

(iii) The contracting officer shall require each contractor receiving data subject to GPLR to execute the Standard Non-disclosure Agreement before receipt of the data. If a contractor has previously signed an agreement, the earlier agreement may be provided.

greater than five (5) years

which approval shall not be unreasonably withheld.

for computer software.

(a typo!)

re 227.473-3 (b)

The contracting officer's
notification shall provide
that, if after receiving the
notice, the contractor does not
establish, maintain and follow
adequate marking procedures,
the contracting officer may insert
a bilateral modification in the
contract providing for the with-
hold of payments under the
clause at 252.227-7030 for
failure to satisfy the marking
requirements of 252.227-7018
and 252.227-7029.

(1) Demonstrates that the omission was inadvertent;

(2) Establishes that the use of the markings is authorized; and

(3) Relieves the Government of liability with respect to the technical data.

(d) *Unjustified markings.* If the contracting officer believes that restrictive markings are not justified, the contracting officer will follow the procedures in 227.473-4 and the clause at 252.227-7037.

(e) *Non-conforming markings.* If technical data which the contractor is authorized by the contract to furnish with restrictive markings is received with non-conforming markings, the technical data shall be used according to the proper restriction, and the contractor shall be required to correct the markings to conform with the contract. Copyright notices which conform to the requirement in 17 U.S.C. 401 and 402 are not considered restrictive markings. If the contractor fails to correct the markings within 60 days after notice, Government personnel may correct the markings at the contractor's expense, notify the contractor in writing, and thereafter may use the technical data accordingly.

227.473-4 Validation of restrictive markings on technical data.

(a) *General.* The clause at 252.227-7037 sets forth rights and procedures pertaining to the validation of restrictive markings asserted by contractors and subcontractors on deliverable technical data and shall be included in all solicitations and contracts which require the delivery of technical data. The Government ~~should~~ review the validity of any asserted restriction on technical data deliverable under a contract. This review should be accomplished before acceptance of the technical data, but no later than three years after final payment or three years after delivery of the technical data to the Government, whichever is later. The contracting officer may challenge restrictive markings if there are reasonable grounds to question their validity but only if the three-year period has not expired. However, the Government may challenge a restrictive marking at any time if the technical data (1) is publicly available; (2) has been furnished to the United States without restriction; or (3) has been otherwise made available without restriction. Only the contracting officer's final decision resolving a formal challenge constitutes "validation" as addressed in 10 U.S.C. 2321. A decision by the Government not to challenge a restrictive marking or

asserted restriction does not constitute "validation".

(b) *Prechallenge request for information.* (1) Prior to making a written determination to challenge, the contracting officer must request the contractor or subcontractor to furnish information explaining the basis for any asserted restriction. If this information is incomplete, additional justification should be requested. The contracting officer should provide a reasonable time for submission of the required data.

(2) The contracting officer should request advice from the cognizant Government activity having interest in the validity of the markings.

(3) If the contracting officer, after reviewing all available information, determines that reasonable grounds exist to question the current validity of a restrictive marking, and that continued adherence to the marking would make subsequent competition impracticable or if the contractor or subcontractor fails to respond to the prechallenge request within a reasonable period, the contracting officer shall challenge the restriction following the procedures in the clause at 252.227-7037.

227.473-5 Remedies for noncomplying technical data.

(a) When data does not comply with the contract, the contracting officer should consider all remedies. These remedies include reduction of progress payments, withholding final payment, contract termination, and a reduction in contract price or fee.

(b) The clause at 252.227-7030, Technical Data—Withholding of Payment, is designed to assure timely delivery of technical data and shall be included in solicitations and contracts requiring delivery of technical data. Unless the contract specifies a lesser withholding limit, the clause permits withholding up to 10 percent of the contract price. The contracting officer shall determine the amount to be withheld after considering the estimated value of the technical data to the Government. Payment shall not be withheld when non-delivery results from causes beyond the control and without the fault or negligence of the contractor.

(c) If delivery of technical data is required, the clause at 252.227-7036, Certification of Technical Data Conformity, shall be included in solicitations and any resultant contract.

227.473-6 (Reserved)

227.474 (Reserved)

227.475 Other procedures.

227.475-1 Data requirements.

(a) The clause at 252.227-7031, Data Requirements, shall be included in all solicitations and contracts, except that the clause need not be included in—

(1) Any contract or order less than \$25,000;

(2) Any contract awarded to a contractor outside the United States, except those awarded under Subpart 225.71, Canadian Purchases;

(3) Any research or exploratory development contract when reports are the only deliverable item(s);

(4) Any service contract, when the contracting officer determines that the use of the DD Form 1423 is impractical;

(5) Any contract under which construction and architectural drawings and specifications are the only deliverable items;

(6) Any contract for commercial items when the only deliverable data is such an item, or would be packaged or furnished with such items in accordance with customary trade practices; or

(7) Any contract for items containing potentially dangerous material requiring controls to assure adequate safety, when the only deliverable data is the

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Materials Safety Data Sheet (MSDS) required by the clause at FAR 52.223-3.

(b) The clause at 252.227-7031, Data Requirements, states that the contractor is required to deliver only data listed on the DD Form 1423 and data deliverable under clauses prescribed in the FAR and DFARS. *And make a part of the contract.*

227.475-2 Deferred delivery and deferred ordering.

(a) *General.* Technical data and computer software is expensive to prepare, maintain and update. By delaying the delivery of technical data or software until needed, storage requirements are reduced and the probability of using obsolete technical data and computer software is decreased. Purchase of technical data and computer software which may become obsolete because of hardware changes is also minimized.

(b) *Deferred delivery.* When the contract requires delivery of technical data or computer software, but does not contain a time for delivery, the clause at 252.227-7026 "Deferred Delivery of Technical Data and Computer Software", shall be included in the contract. The clause permits the contracting officer to require the delivery of data identified as "deferred delivery" data at any time until two years after acceptance by the

227.478-2 Acquisition and use of plans, specifications, and drawings.

(a) *Architectural designs and data clauses for architect-engineer or construction contracts—(1) Plans and specifications and as-built drawings.* (i) Except as provided in (a)(1)(ii) below, use the clause at 252.227-7022, Government Rights (Unlimited), in solicitations and contracts for architect-engineer services and for construction involving architect-engineer services.

(ii) When the purpose of a contract for architect-engineer services or for construction involving architect-engineer services is to obtain a unique architectural design of a building, a monument, or construction of similar nature, which for artistic, aesthetic or other special reasons the Government does not want duplicated, the Government may acquire exclusive control of the data pertaining to design by including the clause at 252.227-7023, Drawings and Other Data to Become Property of Government, in solicitations and contracts.

(2) *Shop drawings for construction.* The Government shall obtain unlimited rights in shop drawings for construction. In solicitations and contracts calling for delivery of shop drawings, include the clause at 252.227-7033, Rights in Shop Drawings.

227.478-3 Contracts for construction supplies and research and development work.

The provisions and clauses required by this section shall not be used when the acquisition is limited to either (a) construction supplies or materials, (b) experimental, developmental, or research work, or test and evaluation studies of structures, equipment, processes, or materials for use in construction; or (c) both.

227.478-4 [Reserved]

227.478-5 Approval of restricted designs.

The clause at 252.227-7024, Notice and Approval of Restricted Designs, may be included in architect-engineer contracts to permit the Government to make informed decisions concerning noncompetitive aspects of the design.

227.479 Small Business Innovative Research Program (SBIR Program).

(a) Public Law 97-219, "Small Business Innovation Development Act of 1982", requires the Department of Defense to establish a Small Business Innovation Research Program (SBIR Program). Small Business Administration (SBA) Policy Directive

No. 65-01 provides guidance on the program.

(b)(1) Data and computer software generated under an SBIR program contract shall not be disclosed outside the Government for two years after contract completion, except—

(i) When necessary for program evaluation, or

(ii) When the contractor ^{a prior} consents in writing to additional disclosure.

(2) Upon expiration of the period of non-disclosure, the Government shall have a nonexclusive, worldwide, royalty-free license in technical data and computer software for Government use.

(c) Copyrights in technical data and computer software generated under an SBIR program contract shall, when agreed to in writing by the contracting officer, be owned by the contractor. The Government should obtain a royalty-free license under any copyright. Each publication of copyrighted material should contain an appropriate acknowledgment and disclaimer statement.

(d) The clause at 252.227-7013, Rights in Technical Data and Computer Software, with its Alternate II, shall be included in all contracts awarded under the SBIR Program which require delivery of technical data or computer software.

227.480 Copyrights.

(a) In general, the copyright law gives an owner of copyright the exclusive rights to—

- (1) Reproduce the copyrighted work;
- (2) Prepare derivative works;
- (3) Distribute copies or phonorecords to the public;
- (4) Perform the copyrighted work publicly; and
- (5) Display the copyrighted work publicly.

(b) Any material that is protected under the Copyright law is not in the public domain, even though it may have been published. Acts inconsistent with the rights in (a) above may not be exercised without a license from the copyright owner.

(c) Department of Defense policy allows the contractor to copyright any work of authorship first prepared, produced, originated, developed, or generated under a contract, unless the work is designated a "special work". If the work is a special work, the Government retains ownership and control of the work. The contractor may not assert any rights or claim to copyright in special works. The contractor is required to grant to the Government and authorize the

Government to grant to others a nonexclusive, paid-up, worldwide license for Government purposes in any work of authorship (other than a "special work") first prepared, produced, originated, developed, or generated under the contract.

(d) The clause at 252.227-7013, Rights in Technical Data and Computer Software, requires the contractor to grant the Government and authorizes the Government to grant to others a nonexclusive, paid-up, worldwide license for Government purposes, under any copyright owned by the contractor in any technical data or computer software prepared for or acquired by the Government under the contract. The clause at 252.227-7020, Rights in Data—Special Works, requires that any work first produced in the performance of the contract become the sole property of the Government, and the contractor agrees not to assert any rights or establish any claim to copyright in such work. This clause requires that the contractor grant to the Government and authorize the Government to grant to others a nonexclusive, paid-up, worldwide license for Government purposes in any portion of a work which is not first produced in the performance of the contract but in which copyright is owned by the contractor and which is incorporated in the work furnished under the contract.

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(e) The clauses at 252.227-7013 and 252.227-7020 provide that, unless written approval of the contracting officer is obtained, the contractor agrees not to include in any work prepared, produced, originated, developed, generated or acquired under the contract; any work of authorship in which copyright is not owned by the contractor without acquiring for the Government and those acting by or on behalf of the Government a nonexclusive, paid-up, worldwide license for Government purposes in the copyrighted work.

227.481 Acquisition of rights in computer software. TEXT IS MISSING !!!

227.482 [Reserved]

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Sections 252.227-7013, 252.227-7018 through 252.227-7024, 252.227-7028 through 252.227-7037 are revised; sections 252.227-7016, 252.227-7017 and 252.227-7025 are removed and reserved; and section 252.227-7038 is added to read as follows:

2 In view of the exclusive rights in (a) above, any

means that technical data or computer software has not been released to the public or furnished to others without restriction on further use or disclosure. Delivery of other than unlimited rights technical data or computer software to or for the Government under the contract does not, in itself, constitute release to the public.

(b) Rights in Technical Data—(1)

Unlimited Rights. Unless otherwise agreed in writing, the Government is entitled to and will receive unlimited rights in:

(i) Technical data pertaining to an item, component, or process which has been or will be developed exclusively with Government funds;

(ii) Technical data resulting directly from performance of experimental, developmental, or research work which was specified as an element of performance under this or any other Government contract or subcontract;

(iii) Form, fit, and function data pertaining to items, components, or processes prepared or required to be delivered under this or any other Government contract or subcontract;

(iv) Manuals or instructional materials (other than detailed manufacturing or process data) prepared or required to be delivered under this or any other contract or any subcontract hereunder necessary for installation, operation, maintenance, or training purposes;

(v) Technical data prepared or required to be delivered under this or any other Government contract or subcontract and constituting corrections or changes to Government-furnished data or computer software;

(vi) Technical data which is otherwise publicly available, or has been released or disclosed by the Contractor or subcontractor, without restriction on further release or disclosure;

(vii) Technical data in which the Government has obtained unlimited rights as a result of negotiations;

(viii) Technical data previously delivered subject to either GPLR or limited rights and the restrictive condition has expired; and

(ix) Technical data delivered under the contract, which at the time of delivery, are not identified in the listing required by paragraph (k) of this clause.

(2) Government Purpose License Rights. The Government shall have Government purpose license rights (GPLR) in technical data which the parties have agreed will be furnished with GPLR. The Government may disclose or provide GPLR data to a person or corporation that has executed the Standard Non-Disclosure Agreement. This agreement establishes the third party beneficiary status of the Contractor identified in the GPLR legend. If the recipient of GPLR data has executed the Standard Non-Disclosure Agreement, the Contractor shall have no claim or right of action against the Government for damages related to misuse or unauthorized disclosure of the data. GPLR shall be effective, during the time period specified in the contract, only when the portion or portions of each piece of data subject to such rights are identified (for example, by circling, underscoring, or a note), and are marked with the legend below containing:

(i) The number of the prime contract under which the technical data is to be delivered;

(ii) The name of the Contractor and/or any subcontractor asserting Government purpose license rights; and

(iii) The date when the data will be subject to unlimited rights.

Government Purpose License Rights Legend

Contract No. _____
Contractor: _____

Government purpose license rights shall be effective until _____

(insert date certain)

thereafter, the Government purpose license rights will expire and the Government shall have unlimited rights in the technical data.

The restrictions governing use of technical data marked with this legend are set forth in the definition of "Government Purpose License Rights" in paragraph (a)(14) above. This legend, together with the indications of the portions of this data which are subject to Government purpose license rights, shall be included on any reproduction hereof which includes any part of the portions subject to such limitations.

(3) Limited Rights. Unless otherwise agreed, the Government shall have limited rights in:

(i) Technical data pertaining to items, components, processes or computer software developed exclusively at private expense, except for data in the categories in (a)(1) above;

(ii) Technical data that the parties have agreed will be subject to limited rights for a specified period of time; and

(iii) Technical data listed or described in a license agreement made a part of the contract and subject to conditions other than those described in the definitions of limited rights. Notwithstanding any contrary provision in the license agreement, the Government shall have the rights included in the definition of "limited rights" in paragraph (a)(15) above.

Limited rights will remain in effect so long as the technical data remains unpublished and provided that only the portions of each piece of data subject to limited rights are identified (for example, by circling, underscoring, or a note), and the piece of data is marked with the legend below containing:

(A) The number of the prime contract under which the technical data is to be delivered; and

(B) The name of the Contractor and/or any subcontractor asserting limited rights.

(C) The date the data will be subject to unlimited rights (if applicable).

Limited Rights Legend

Contract No. _____
Contractor: _____

(For technical data which the parties have agreed will be subject to limited rights for a specified time period, insert the agreed upon date. If the limited rights are not subject to an expiration date, so indicate).

Limited rights shall be effective until _____

(insert date certain)

thereafter the limited rights will expire and the Government shall have unlimited rights in the technical data.

The restrictions governing the use and disclosure of technical data marked with this legend are set forth in the definition of "limited rights" in paragraph (a)(15) above. (For technical data which the parties have agreed will be subject to rights other than those described in the definitions of limited rights or GPLR in paragraphs (a)(15) and (a)(14) above, insert the following statement:

In addition to the minimum rights described in the definition of limited rights in DFARS clause at 252.227-7013, the Government shall have the rights described in the license or agreement made a part of Contract No. _____

This legend, together with the indications of the portions of this data which are subject to limited rights, shall be included on any reproduction hereof which includes any part of the portions subject to such limitations. This technical data will remain subject to limited rights only so long as it remains "unpublished" as defined in paragraph (a) above.

(c) Rights in Computer Software—(1)

Restricted Rights. (i) The Government shall have restricted rights in computer software, listed or described in a license agreement made a part of this contract, which the parties have agreed will be furnished with restricted rights. Notwithstanding any contrary provision in any such license agreement, the Government shall have the rights included in the definition of "restricted

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rights" in paragraph (a)(17) above. Unless the computer software is marked by the Contractor with the following legend:

Restricted Rights Legend

Use, duplication or disclosure is subject to restrictions stated in Contract No. _____ with _____ (Name of Contractor) _____ and the related computer software documentation includes a prominent statement of the restrictions applicable to the computer software, the Government shall have unlimited rights in the software. The Contractor may not place any legend on computer software restricting the Government's rights in such software, unless the restrictions are set forth in a license agreement made a part of this contract prior to the delivery date of the software. Failure of the Contractor to apply a restricted rights legend to the computer software shall relieve the Government of liability with respect to the unmarked software.

(ii) Notwithstanding subparagraph (c)(1)(i) above, commercial computer software and related documentation developed at private expense and not in public domain may be marked with the following Legend:

Restricted Rights Legend

Use, duplication, or disclosure by the Government is subject to restrictions as set forth in subparagraph (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at DFARS 252.227-7013.

(Name of Contractor and Address)
When acquired by the Government.

desires exclusive rights to commercialize, with Government approval.

(2) With respect to each item, component, process, or computer software identified in (j)(1)(ii) above, the Contractor shall also notify the Contracting Officer of the total development cost known to the Contractor of the item, component, process, or computer software and the percentage of the total development cost known to the Contractor which was contributed by the Contractor.

(3) Such notification is not required with respect to items, components, processes or computer software for which such notice was given pursuant to preaward notification of rights in technical data in connection with this contract.

(4) Such notification shall be accompanied by the appropriate listing and certification required by the clause at DFARS 252.227-7038.

(k) *Identification of restrictions on Government rights.* Technical data and computer software shall not be tendered to the Government with other than unlimited rights, unless the technical data or computer software are contained in a listing made part of this contract. This listing is intended to facilitate acceptance of the technical data and computer software by the Government and does not change, waive, or otherwise modify the rights or obligations of the parties under the clause at DFARS 252.227-7037. As a minimum, this listing must—

(1) Identify the items, components, processes, or computer software to which the restrictions on the Government apply;

(2) Identify or describe the technical data or computer software subject to other than unlimited rights; and

(3) Identify or describe, as appropriate, the category or categories of Government rights, the agreed-to time limitations, or any special restrictions on the use of disclosure of the technical data or computer software.

(l) *Postaward Negotiation—Disputes.* If, after exhausting all reasonable efforts, the parties fail to agree on the apportionment of the rights in technical data furnished under this contract by the date established in the contract for agreement, or within any extension established by the Contracting Officer, then the Contracting Officer may establish the respective data rights of the parties, subject to Contractor appeal as provided in the Disputes clause. In any event, the Contractor shall proceed with completion of the contract.

(End of clause)

Alternate I (APR 1988)

As prescribed at 227.475-8, add the following paragraph to the basic clause:

(m) *Publication for sale.* If, prior to publication for sale by the Government and within the period designated in the contract or task order, but in no event later than twenty-four (24) months after delivery of such data, the Contractor publishes for sale any data (1) designated in the contract as being subject to this paragraph and (2) delivered under this contract, and promptly notifies the Contracting Officer of these publications, the Government shall not publish such data for sale or authorize others to do so. This limitation on the Government's right to publish for sale any such data so published

by the Contractor shall continue as long as the data is protected as a published work under the copyright law of the United States and is reasonably available to the public for purchase. Any such publication shall include a notice identifying this contract and recognizing the license rights of the Government under this clause. As to all such data not so published by the Contractor, this paragraph shall be of no force or effect.

Alternate II (APR 1988)

As prescribed at 227.479(d), substitute the following paragraphs (b) and (c) for the existing paragraphs (b) and (c) in the basic clause.

(b) *Rights in Technical Data—(1) Unlimited Rights.* The Government is entitled to and will receive unlimited rights in:

(i) Form, fit, and function data pertaining to items, components, or processes prepared or required to be delivered under this or any other Government contract or subcontract;

(ii) Manuals or instructional materials (other than detailed manufacturing or process data) prepared or required to be delivered under this or any other contract or any subcontract hereunder necessary for installation, operation, maintenance, or training purposes;

(iii) Technical data prepared or required to be delivered under this or any other Government contract or subcontract and constituting corrections or changes to Government-furnished data; and

(iv) Technical data which is otherwise publicly available, or has been released or disclosed by the contractor or subcontractor, without restriction on further release or disclosure.

(2) *Limited Rights.* The Government shall have limited rights in:

(i) Unpublished technical data pertaining to items, components or processes developed exclusively at private expense, and unpublished computer software documentation related to computer software that is acquired with restricted rights, other than such data included in (b)(1) above. Limited rights shall be effective provided that only the portion or portions of each piece of data to which limited rights are to be asserted are identified (for example, by circling, underscoring, or a note), and that the piece of data is marked with the legend below containing:

(A) The number of the prime contract under which the technical data is to be delivered; and

(B) The name of the Contractor and/or any subcontractor asserting limited rights.

Limited Rights Legend

Contract No. _____
Contractor: _____

The restrictions governing the use of technical data marked with this legend are set forth in the definition of "Limited Rights" in DFARS clause at 252.227-7013. This legend, together with the indications of the portions of this data, shall be included on any reproduction hereof which includes any part of the portions subject to limited rights. The limited rights legend shall be honored only as

long as the data continues to meet the definition of limited rights.

(3) *Government Purpose License Rights.* For a period of two (2) years (or such other period as may be authorized by the Contracting Officer for good cause shown) after the delivery and acceptance of the last deliverable item under the contract, the Government shall have limited rights and, after the expiration of the two-year period, shall have Government purpose license rights in any technical data prepared or required to be delivered under this contract or subcontract hereunder, which is not otherwise subject to unlimited or limited rights pursuant to subparagraph (b)(1) or (b)(2) above. The Government shall not be liable for unauthorized use or disclosure of the data by third parties. Government Purpose License Rights shall be effective provided that only the portion or portions of each piece of data to which such rights are to be asserted are identified (for example, by circling, underscoring, or a note), and that the piece of data is marked with the legend below:

(A) The number of the prime contract under which the technical data is to be delivered; and

(B) The name of the contractor and/or any subcontractor asserting Government Purpose License Rights.

Government Purpose License Rights (SBIR Program)

Contract No. _____
Contractor: _____

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For a period of two (2) years after delivery and acceptance of the last deliverable item under the above contract, this technical data shall be subject to the restrictions contained in the definition of "Limited Rights" in DFARS clause at 252.227-7013. After the two-year period, the data shall be subject to the restrictions contained in the definition of "Government Purpose License Rights" in DFARS clause at 252.227-7013. The Government assumes no liability for unauthorized use or disclosure by others. This legend, together with the indications of the portions of the data which are subject to such limitations, shall be included on any reproduction hereof which contains any portions subject to such limitations and shall be honored only as long as the data continues to meet the definition on Government purpose license rights.

(c) *Rights in Computer Software—(1) Restricted Rights.* (i) The Government shall have restricted rights in computer software, listed or described in a license agreement made a part of this contract, which the parties have agreed will be furnished with restricted rights. Notwithstanding any contrary provision in any such license agreement, the Government shall have the rights included in the definition of "restricted rights" in paragraph (a)(17) above. Unless the computer software is marked by the Contractor with the following legend:

Restricted Rights Legend

Use, duplication or disclosure is subject to restrictions stated in Contract No. _____

Rights in Data—Special Works (MAR 1979)

(a) The term "works" as used herein includes literary, musical, and dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and works of similar nature. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) All works first produced in the performance of this contract shall be the sole property of the Government, which shall be considered the "person for whom the work was prepared" for the purpose of authorship in any copyrightable work under 17 U.S.C. 201(b), and the Government shall own all of the rights comprised in the copyright. The Contractor agrees not to assert or authorize others to assert any rights, or establish any claim to copyright, in such works. The Contractor, unless directed to the contrary by the Contracting Officer, shall place on any such works delivered under this contract the following notice:

© (Year date of delivery) United States Government as represented by the Secretary of (department). All rights reserved. In the case of a phonorecord, the © will be replaced by P.

(c) Except as otherwise provided in this contract, the Contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world (1) to reproduce in copies or phonorecords, to prepare derivative works, to distribute copies or phonorecords, and to perform or display publicly any portion of a work which is not first produced in the performance of this contract but in which copyright is owned by the Contractor and which is incorporated in the work furnished under this contract, and (2) to authorize others to do so for Government purposes.

(d) Unless written approval of the Contracting Officer is obtained, the Contractor shall not include in any works prepared for or delivered to the Government under this contract any works of authorship in which copyright is not owned by the Contractor or the Government without acquiring for the Government any rights necessary to perfect a license of the scope set forth in paragraph (c) above.

(e) The Contractor shall indemnify and save and hold harmless the Government, and its officers, agents and employees acting for the Government, against any liability, including costs and expenses, (1) for violation of proprietary rights, copyrights, or rights of privacy or publicity, arising out of the creation, delivery, or use of any works furnished under this contract, or (2) based upon any libelous or other unlawful matter contained in such works.

(f) Nothing contained in this clause shall imply a license to the Government under any patent, or be construed as affecting the scope of any license of other right otherwise granted to the Government under any patent.

(g) Paragraphs (c) and (d) above are not applicable to material furnished to the Contractor by the Government and incorporated in the work furnished under the contract; *Provided*, such incorporated material is identified by the Contractor at the

time of delivery of such work.
(End of clause)

252.227-7021 Rights in data—existing works.

As prescribed at 227.477(b), insert the following clause:

Rights in Data—Existing Works (MAR 1979)

(a) The term "works" as used herein includes literary, musical, and dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and works of a similar nature. The term does not include financial reports, cost analyses, and other information incidental to contract administration.

(b) Except as otherwise provided in this contract, the Contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world (1) to distribute, perform publicly, and display publicly the works called for under this contract and (2) to authorize others to do so for Government purposes.

(c) The Contractor shall indemnify and save and hold harmless the Government, and its officers, agents, and employees acting for the Government, against any liability, including costs and expenses, (1) for violation of proprietary rights, copyrights, or rights of privacy or publicity arising out of the creation, delivery, or use, of any works furnished under this contract, or (2) based upon any libelous or other unlawful matter contained in same works.

(End of clause)

252.227-7022 Government rights (unlimited).

As prescribed at 227.478-2(a)(1)(i), insert the following clause:

Government Rights (Unlimited) (MAR 1979)

The Government shall have unlimited rights, in all drawings, designs, specifications, notes and other works developed in the performance of this contract, including the right to use same on any other Government design or construction without additional compensation to the Contractor. The Contractor hereby grants to the Government a paid-up license throughout the world to all such works to which he may assert or establish any claim under design patent or copyright laws. The Contractor for a period of three (3) years after completion of the project agrees to furnish the original or copies of all such works on the request of the Contracting Officer.

(End of clause)

252.227-7023 Drawings and other data to become property of Government.

As prescribed at 227.478-2(a)(1)(ii), insert the following clause:

Drawings and Other Data to Become Property of Government (MAR 1979)

All designs, drawings, specifications, notes and other works developed in the performance of this contract shall become the sole property of the Government and may be

used on any other design or construction without additional compensation to the Contractor. The Government shall be considered the "person for whom the work was prepared" for the purpose of authorship in any copyrightable work under 17 U.S.C. 201(b). With respect thereto, the Contractor agrees not to assert or authorize others to assert any rights nor establish any claim under the design patent or copyright laws. The Contractor for a period of three (3) years after completion of the project agrees to furnish all retained works on the request of the Contracting Officer. Unless otherwise provided in this contract, the Contractor shall have the right to retain copies of all works beyond such period.

(End of clause)

252.227-7024 Notice and approval of restricted designs.

As prescribed at 227.478-5, insert the following clause:

Notice and Approval of Restricted Designs (APR 1984)

In the performance of this contract, the Contractor shall, to the extent practicable, make maximum use of structures, machines, products, materials, construction methods, and equipment that are readily available through Government or competitive commercial channels, or through standard or

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proven production techniques, methods, and processes. Unless approved by the Contracting Officer, the Contractor shall not produce a design or specification that requires in this construction work the use of structures, products, materials, construction equipment, or processes that are known by the Contractor to be available only from a sole source. The Contractor shall promptly report any such design or specification to the Contracting Officer and give the reason why it is considered necessary to so restrict the design or specification.

(End of clause)

252.227-7025 (Reserved) ~~CLAUSE DELETED~~**252.227-7026 Deferred delivery of technical data or computer software.**

As prescribed at 227.475-2(b), insert the following clause:

Deferred Delivery of Technical Data or Computer Software (APR 1988)

The Government shall have the right to require, at any time during the performance of this contract, within two (2) years after either acceptance of all items (other than data or computer software) to be delivered under this contract or termination of this contract, whichever is later, delivery of any technical data or computer software item identified in this contract as "deferred delivery" data or computer software. The obligation to furnish such technical data required to be prepared by a subcontractor and pertaining to an item obtained from him shall expire two (2) years after the date Contractor accepts the last delivery of that item from that subcontractor for use in performing this contract.

(End of clause)

assertion. Offerors will furnish, at the written request of the Contracting Officer, evidence to support any such assertion. Such notification shall be accompanied by the appropriate certification at DFARS 252.227-7038.

(End of provision)

252.227-7036 Certification of technical data conformity.

As prescribed at 227.473-5, insert the following clause:

Certification of Technical Data Conformity (MAY 1987)

(a) All technical data delivered under this contract shall be accompanied by the following written certification:

The Contractor, _____, hereby certifies that, to the best of its knowledge and belief, the technical data delivered herewith under Contract No. _____ is complete, accurate, and complies with all requirements of the contract.

Date _____
Name and Title of Certifying Official _____

This written certification shall be dated and the certifying official (identified by name and title) shall be duly authorized to bind the Contractor by the certification.

(b) The Contractor shall identify, by name and title, each individual (official) authorized by the Contractor to certify in writing that the technical data is complete, accurate, and complies with all requirements of the contract. The Contractor hereby authorizes direct contact with the authorized individual responsible for certification of technical data. The authorized individual shall be familiar with the Contractor's technical data conformity procedures and their application to the technical data to be certified and delivered.

(c) Technical data delivered under this contract may be subject to reviews by the Government during preparation and prior to acceptance. Technical data is also subject to reviews by the Government subsequent to acceptance. Such reviews may be conducted as a function ancillary to other reviews, such as in-process reviews or configuration audit reviews.

(End of clause)

252.227-7037 Validation of restrictive markings on technical data.

As prescribed in 227.473-4(a) insert the following clause:

Validation of Restrictive Markings on Technical Data (APR 1988)

(a) *Definitions.* The terms used in this clause are defined in the clause at DFARS 252.227-7013 of the Department of Defense Federal Acquisition Regulation Supplement (DFARS).

(b) *Justification.* The Contractor or subcontractor at any tier is responsible for maintaining records sufficient to justify the validity of its markings that impose restrictions on the Government and others to use, duplicate, or disclose technical data delivered or required to be delivered under the contract or subcontract, and shall be prepared to furnish to the Contracting Officer a written justification for such restrictive

markings in response to a challenge under paragraph (d) below.

(c) *Prechallenge Request for Information.*

(1) The Contracting Officer may request the Contractor or subcontractor to furnish a written explanation for any restriction asserted by the Contractor or subcontractor on the right of the United States or others to use technical data. If, upon review of the explanation submitted, the Contracting Officer remains unable to ascertain the basis of the restrictive marking, the Contracting Officer may further request the Contractor or subcontractor to furnish additional information in the records of, or otherwise in the possession of or reasonably available to, the Contractor or subcontractor to justify the validity of any restrictive marking on technical data delivered or to be delivered under the contract or subcontract (e.g., a statement of facts accompanied with supporting documentation). The Contractor or subcontractor shall submit such written data as requested by the Contracting Officer within the time required or such longer period as may be mutually agreed.

(2) If the Contracting Officer, after reviewing the written data furnished pursuant to paragraph (c)(1) above, or any other available information pertaining to the validity of a restrictive marking, determines that reasonable grounds exist to question the current validity of the marking and that continued adherence to the marking would make impracticable the subsequent competitive acquisition of the item, component, or process to which the technical data relates, the Contracting Officer shall follow the procedures in (d) below.

(3) If the Contractor or subcontractor fails to respond to the Contracting Officer's request for information under paragraph (c)(1) above, and the Contracting Officer determines that continued adherence to the marking would make impracticable the subsequent competitive acquisition of the item, component, or process to which the technical data relates, the Contracting Officer may challenge the validity of the marking as described in paragraph (d) below.

(d) *Challenge.* (1) Notwithstanding any provision of this contract concerning inspection and acceptance, if the Contracting Officer determines that a challenge to the restrictive marking is warranted, the Contracting Officer shall send a written challenge notice to the Contractor or subcontractor asserting the restrictive markings. Such challenge shall:

- (i) State the specific grounds for challenging the asserted restriction;
- (ii) Require a response within sixty (60) days justifying and providing sufficient evidence as to the current validity of the asserted restriction; and
- (iii) State that a DoD Contracting Officer's final decision, issued pursuant to paragraph (f) below, sustaining the validity of a restrictive marking identical to the asserted restriction, within the three-year period preceding the challenge, shall serve as justification for the asserted restriction if the validated restriction was asserted by the same Contractor or subcontractor (or any licensee of such Contractor or subcontractor)

to which such notice is being provided.

(iv) State that failure to respond to the challenge notice may result in issuance of a final decision pursuant to paragraph (e) below.

(2) The Contracting Officer shall extend the time for response as appropriate if the Contractor or subcontractor submits a written request showing the need for additional time to prepare a response.

(3) The Contractor's or subcontractor's written response shall be considered a claim within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601 *et seq.*), and shall be certified in the form prescribed by FAR 33.207, regardless of dollar amount.

(4) A Contractor or subcontractor receiving challenges to the same restrictive markings from more than one Contracting Officer shall notify each Contracting Officer of the existence of more than one challenge. The notice shall also state which Contracting Officer initiated the first in time unanswered challenge. The Contracting Officer initiating the first in time unanswered challenge after consultation with the Contractor or subcontractor and the other Contracting Officers, shall formulate and distribute a schedule for responding to each of the challenge notices to all interested parties. The schedule shall afford the Contractor or subcontractor an opportunity to respond to each challenge notice. All parties will be bound by this schedule.

10797

(e) *Final Decision When Contractor or Subcontractor Fails to Respond.* Upon a failure of a Contractor or subcontractor to submit any response to the challenge notice, the Contracting Officer will issue a final decision to the Contractor or subcontractor in accordance with the Disputes clause at FAR 52.233-1, pertaining to the validity of the asserted restriction. This final decision shall be issued as soon as possible after the expiration of the time period of paragraph (d)(1)(ii) or (d)(2) above. Following the issuance of the final decision, the Contracting Officer will comply with the procedures in (f)(2)(ii) through (iv) below.

(f) *Final Decision When Contractor or Subcontractor Responds.* (1) If the Contracting Officer determines that the Contractor or subcontractor has justified the validity of the restrictive marking, the Contracting Officer shall issue a final decision to the Contractor or subcontractor sustaining the validity of the restrictive marking, and stating that the Government will continue to be bound by the restrictive marking. This final decision shall be issued within sixty (60) days after receipt of the Contractor's or subcontractor's response to the challenge notice, or within such longer period that the Contracting Officer has notified the Contractor or subcontractor that the Government will require. The notification of a longer period for issuance of a final decision will be made within sixty (60) days after receipt of the response to the challenge notice.

(2)(i) If the Contracting Officer determines that the validity of the restrictive marking is not justified, the Contracting Officer shall issue a final decision to the Contractor or



DEPARTMENT OF THE ARMY
HEADQUARTERS, US ARMY COMMUNICATIONS-ELECTRONICS COMMAND
AND FORT MONMOUTH
FORT MONMOUTH, NEW JERSEY 07703-5000

REPLY TO
ATTENTION OF

May 5, 1988

Legal Office

DAR Council
ATTN: Mr. Charles W. Lloyd
Executive Secretary
ODASS(P)DARS
c/o OASD(P&L) (MRS)
Room 3D139
The Pentagon
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

The following comments were sent to the AMC Assistant Command Counsel for Intellectual Property Law, Robert P. Gibson, for his review. A copy of these comments are being sent to you for your consideration.

If I can be of further assistance, please feel free to contact me at (201) 532-4112 or (Autovon 992-4112).

Sincerely,

Sheldon Kanars
Assistant Chief Counsel
for Intellectual Property Law

Enclosure



DEPARTMENT OF THE ARMY
HEADQUARTERS, US ARMY COMMUNICATIONS-ELECTRONICS COMMAND
AND FORT MONMOUTH
FORT MONMOUTH, NEW JERSEY 07703-5000

REPLY TO
ATTENTION OF

S: 6 May 1988

AMSEL-LG-L (AMCCC-L/1 April 88) 1st End J.J. Drew/jab/AV 992-3384
SUBJECT: New DFARS Technical Data Regulations

FROM: Commander, U.S. Army Communications-Electronics Command, ATTN:
AMSEL-LG-L, S. Kanars, Fort Monmouth, New Jersey 07703 5 May 1988

FOR: Commander, US Army Materiel Command, ATTN: AMCCC-L, Mr. Robert
P. Gibson, 5001 Eisenhower Avenue, Alexandria, VA 22333-0001

1. Page 27.4-19 Paragraphs (iv) - Non-Standard License Rights

This paragraph requires that all licenses wherein non-standard license rights are acquired shall not be negotiated unless approved by the head of the contracting activity. Non-standard license rights are defined as those other than Limited Rights, Unlimited Rights, or Government Purpose License Rights. "Limited Rights" is defined on page 27.4-5, and with the written permission of the party asserting the rights, encompasses a broad range of potential rights to the Government in excess of those minimum limited rights obtained by operation of the standard data rights clause without the written permission of the asserting party. If it is the intent of paragraph (iv) of page 27.4-19 to obtain the permission of the head of the contracting activity for all licenses wherein limited rights greater than the minimum limited rights set out in the definition on page 27.4-5 are to be obtained, then those minimum limited rights should be named and referenced. If, on the other hand, it is the intent of the "Non-Standard License Rights" paragraph to categorize as standard those limited rights which may be obtained with the written consent of the contractor, the paragraph would imply that we could obtain less than the minimum limited rights by getting approval at the head of the contracting activity level. This constitutes a significant departure from past practice. This area should be clarified.

If the intention of the regulation was the first set out above, I suggest the term "Minimum Limited Rights" be defined as set out in Attachment 1 and paragraph (iv) on page 27.4-19 be changed to state that standard licenses are those wherein Unlimited Rights, Government Purpose License Rights, or Minimum Limited Rights are obtained. The approval of the head of contracting activity would be required for non-standard license rights, which would be those rights above Minimum Limited Rights, and which are not equivalent to Government Purpose License Rights, or Unlimited Rights. A deviation from the DFARS would still be required for licenses which would grant less than Minimum Limited Rights in data.

One final comment concerns the parenthetical remark in paragraph (iv): "(i.e., with time limitations)". Was this intended to be: "(e.g., with time limitations)"?

AMSEL-LG-LP

SUBJECT: New DFARS Technical Data Regulations

2. Page 27.4-74

This paragraph precludes the use of the Rights in the Technical Data and Computer Software clause in contracts wherein the use of the Existing Works, Special Works, etc. clauses are being used. This prohibition should be rephrased to permit the use of differing data rights clauses with differing data requirements under the same contract. For example, different data might be purchased from foreign and domestic sources under the same contract and both the basic clause and the foreign acquisition clause would be applicable, albeit for different data.

3. Page 52.227-57

The Validation of Restrictive Markings on Technical Data clause, 52.227-7037, should retain the "clear and convincing evidence" standard previously placed on the contractor in establishing that restrictive markings are appropriate. This test has clear legal precedent while the proposed wording introduces a great deal of uncertainty, both in application and interpretation.

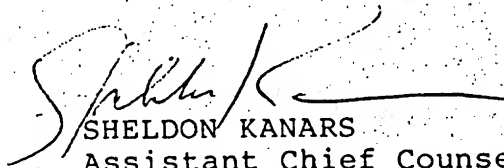
4. In general, references to "data" which consider that word to be plural are annoying. Please adopt the convention that "data" is a collective noun which properly takes the singular form of the verb.

5. Page 27.4-27

Paragraph (c) Unmarked Technical Data has always appeared in the policy section of the DFARS. Shouldn't this policy be implemented somewhere in a contract clause? It seems unfair to subject the contractor to an inadvertent loss of proprietary rights because he may have been unaware of an obscure DFARS policy. Likewise, the procedure for obtaining permission to extend this six-month period for good cause should be simplified and clearly set out in one place. One has to work through a maze of regulations to learn who may grant such an extension.

FOR THE CHIEF COUNSEL:

1 Atch



SHELDON KANARS

Assistant Chief Counsel
for Intellectual Property Law

ATTACHMENT 1

PROPOSED NEW DEFINITION

Definition 1:

"Minimum Limited Rights", as used in this clause, means rights to use, duplicate, or disclose technical data, in whole or in part, by or for the Government, with the express limitation that such technical data shall not be: released or disclosed outside the Government; used by the Government for manufacture, or in the case of computer software documentation, for preparing the same or similar computer software; or used by party other than the Government, except when:

(i) Release, disclosure, or use is necessary for emergency repair or overhaul; provided that the release, disclosure, or use outside the Government shall be made subject to a prohibition against further use, release, or disclosure, and that the party asserting limited rights be notified by the contracting officer of such release, disclosure, or use; or

(ii) Release or disclosure to a foreign government that is in the interest of the United States and is required for evaluational or informational purpose under the conditions of (a) above, except that the release or disclosure may not include detailed manufacturing or process data.

Definition 2:

"Minimum Limited Rights", as used in this clause, means those limited rights which may be exercised by the Government without the permission of the party asserting limited rights.



UNITED STATES DEPARTMENT OF COMMERCE
Associate Under Secretary for
Economic Affairs
Washington, D.C. 20230
(202) 377-3709

6 DEC 1988

Mr. Charles W. Lloyd
Executive Secretary
DAR Council, ODASD (P&L) (MRS)
Room 3D 139
The Pentagon
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

Re: DAR Case 87-303

We have reviewed the referenced case and the DOD revised interim technical data rights rule published in the Federal Register (53 F.R. 43698). As stated in the May 17, 1988 letter (copy attached) from the General Counsel of this Department to the General Counsel of the Department of Defense, it is our view that these regulations do not fully consider and take into consideration the provision of Section 1 (b)(6) of Executive Order (E.O.) 12591 dated April 10, 1987. We believe the correct presumption should be that the contractor is allowed to retain rights to any software, engineering drawings or other technical data first developed during the performance of the contract subject to a royalty-free license by or on behalf of the Government. In other words the normal situation should be that the Government obtains Government Purpose License Rights (GPLR), without a reversion after a specific time limit to unlimited rights, and the contractor has all of the other rights. Appropriate non-disclosure pre-existing blanket or individual case by case agreements could be signed by potential contractors when the Government desires to procure items covered by the GPLR and disclose the data outside of the Government.

The concept of providing a GPLR for most situations is supported by the cited wording of the Executive Order 12591 and the authority provided for by the provisions of 10 U.S.C. 2320(a)(2)(G) to the Secretary of Defense. Thus the disposition of rights in technical data and computer software that we are supporting would be similar to the disposition of the rights in copyrights provided for by 227.480 of your regulations. Our position is also supported by the congressional policy and objectives in section 200 of title 35-cited as a factor to be considered in 10 U.S.C. 2320(a)(2)(E) - whereby in the same chapter contractors are permitted to retain title to invention subject to a license in the United States (35 U.S.C. 202).

Finally, the complex record keeping and extensive paperwork requirements the regulation imposes on all contractors are unduly burdensome and should be simplified.

Sincerely,

A handwritten signature in cursive script, reading "Barry C. Beringer". The signature is written in dark ink and is positioned above the printed name and title.

Barry C. Beringer
Associate Under Secretary
for Economic Affairs

PERKINS COIE

FILE COPY

A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
ONE BELLEVUE CENTER, SUITE 1800 • 411-108TH AVENUE NORTHEAST • BELLEVUE, WASHINGTON 98004
TELEPHONE: (206) 453-6980

April 18, 1989

Mr. Jack Townsend
Chairman, Technical Data Committee
Department of the Navy
Office of the General Counsel
AV Supply Systems Command
Washington, D.C. 20376

Dear Mr. Townsend:

This letter is in reference to the treatment of computer software under the Federal Acquisition Regulations related to patents, data, and copyrights issued by both the Department of Defense (the DFARS) and the civilian agencies (the FARS). It is my understanding that your committee is drafting a common set of rules to apply to all agencies. The purpose of this letter is to call an apparent oversight in both the FARS and the DFARS to your attention.

As you know, under the most recent version of the DFARS, the government acquires the following rights in computer software:

- (a) unlimited rights in, among other things, computer software "resulting directly from performance of experimental, developmental or research work which was specified as an element of performance" in a government contract, and in computer software "required to be originated or developed under a Government contract, or generated as a necessary part of performing a contract," DFAR 252.227-7013(c)(2)(i) and (ii);
- (b) restricted rights in computer software (presumably, other than unlimited rights software) "which the parties have agreed will be furnished with restricted rights" or, in the case of commercial computer software, computer software "developed at private expense," DFAR 252.227-7013(c)(1); and
- (c) government purpose license rights in computer software developed under an SBIR contract, DFAR 252.227-7013(c)(2) (Alternate II).

Mr. Jack Townsend
April 18, 1989
Page 2

Under the FARS, the government acquires the following rights in computer software:

- (a) unlimited rights in computer software "first produced in the performance of" a government contract, FAR 52.227-14(b)(i);
- (b) restricted rights in computer software "developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software; including minor modifications of such computer software," FAR 52.227-14(a) and (g)(3) (Alternate III); and
- (c) SBIR rights in computer software "first produced by a Contractor that is a small business firm in performance of a small business innovative research contract," FAR 52.227-20(a).

The allocation of rights in computer software described above does not take into consideration the requirements of Public Law 96-517, the Bayh-Dole Act of 1980, 35 U.S.C. § 200 et. seq., and subsequent Executive Orders. The Bayh-Dole Act provides that non-profit organizations and small business firms may elect to retain title to any invention or discovery conceived or first actually reduced to practice in the performance of work under a government contract, grant, or cooperative agreement if the invention or discovery is or may be patentable or otherwise protectable under Title 35 of the U.S. Code. 35 U.S.C. §§ 201, 202 (1987). Although the Bayh-Dole Act applies to non-profit organizations and small businesses only, on February 18, 1983 President Reagan issued a Memorandum to the Heads of Executive Departments and Agencies which stated that agency policy on the disposition of inventions made in the performance of government contracts, grants, or cooperative agreements shall be the same as that applied to small business and non-profit organizations under the Bayh-Dole Act.

Computer software is patentable. See e.g., Diamond v. Diehr, 450 U.S. 175, 101 S. Ct. 1048 (1981); Paine, Webber, Jackson & Curtis, Inc. v. Merrill Lynch Pierce Fenner & Smith, Inc., 564 F.Supp 1358 (Del. 1983). Therefore, in accordance with the Bayh-Dole Act and the February 18, 1983 Executive Order, government procurement regulations should provide that government contractors are entitled to retain title to computer software that is or may be patentable.

Mr. Jack Townsend
April 18, 1989
Page 3

There are clauses for government contracts (e.g., FAR 52.227-11) dealing with patents that would allocate rights to patentable computer software developed under a government contract to the contractor. The problem is that a contract to acquire computer software is not likely to include these clauses. Instead, the agencies use the DFAR or FAR Rights in Technical Data clauses, neither of which allocate rights in patentable software developed under the contract to the contractor.

The DFARS related to patents, data, and copyrights should be amended, at a minimum, by inserting a new paragraph in DFAR 252.227-7013(c)(1) as follows:

Except as provided in subparagraph (c)(2) below, and notwithstanding paragraph (c)(3), the Contractor may retain the entire right, title, and interest throughout the world to any computer software that is or may be patentable or otherwise protectable under Title 35 of the United States Code that is conceived or first actually reduced to practice in the performance of work under this contract, subject to the provisions of 35 U.S.C. §§ 203 and 204. With respect to any computer software in which the contractor retains title, the Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the computer software throughout the world.

The remainder of DFAR 252.227-7013(c) should be renumbered by changing subparagraph (1) Restricted Rights, to (2) and changing subparagraph (3) Unlimited Rights, to (3). In addition, a provision should be inserted into DFAR 252.227-482(a)(1) requiring a contract to include DFAR 52.227-11 or -12 whenever the contract may involve the acquisition of patentable computer software.

It is important to note that under the Bayh-Dole Act the contractor can retain title, and the government receives a nonexclusive license to use for government purposes, an invention which is or may be patentable and which is conceived or first actually reduced to practice in the performance of work under a government contract, grant, or cooperative agreement. 35 U.S.C. § 201 (emphasis added). Bayh-Dole does not apply to inventions developed at private expense or otherwise outside the scope of the government contract.

Mr. Jack Townsend
April 18, 1989
Page 4

Therefore, the data clauses must continue to give the government restricted rights in computer software in which it would otherwise be limited to restricted rights. In other words, the Bayh-Dole Act does not undermine the contractor's rights in restricted computer software by giving the government a right to use it for government purposes if it is patentable. Instead, the Bayh-Dole Act applies to patentable computer software that would otherwise be unlimited rights software, and gives the government the equivalent of government purpose license rights instead of unlimited rights.

I would be happy to answer any questions you or your staff may have about this issue.

Very truly yours, .

Cassie Phillips

Catherine L. Phillips

CLP:cw:0384u



UNITED STATES DEPARTMENT OF COMMERCE
Associate Under Secretary for
Economic Affairs
Washington, D.C. 20230
(202) 377-3709

6 DEC 1988

Mr. Charles W. Lloyd
Executive Secretary
DAR Council, ODASD (P&L) (MRS)
Room 3D 139
The Pentagon
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

Re: DAR Case 87-303

We have reviewed the referenced case and the DOD revised interim technical data rights rule published in the Federal Register (53 F.R. 43698). As stated in the May 17, 1988 letter (copy attached) from the General Counsel of this Department to the General Counsel of the Department of Defense, it is our view that these regulations do not fully consider and take into consideration the provision of Section 1 (b) (6) of Executive Order (E.O.) 12591 dated April 10, 1987. We believe the correct presumption should be that the contractor is allowed to retain rights to any software, engineering drawings or other technical data first developed during the performance of the contract subject to a royalty-free license by or on behalf of the Government. In other words the normal situation should be that the Government obtains Government Purpose License Rights (GPLR), without a reversion after a specific time limit to unlimited rights, and the contractor has all of the other rights. Appropriate non-disclosure pre-existing blanket or individual case by case agreements could be signed by potential contractors when the Government desires to procure items covered by the GPLR and disclose the data outside of the Government.

The concept of providing a GPLR for most situations is supported by the cited wording of the Executive Order 12591 and the authority provided for by the provisions of 10 U.S.C. 2320(a) (2)(G) to the Secretary of Defense. Thus the disposition of rights in technical data and computer software that we are supporting would be similar to the disposition of the rights in copyrights provided for by 227.480 of your regulations. Our position is also supported by the congressional policy and objectives in section 200 of title 35-cited as a factor to be considered in 10 U.S.C. 2320(a) (2)(E) - whereby in the same chapter contractors are permitted to retain title to invention subject to a license in the United States (35 U.S.C. 202).

Finally, the complex record keeping and extensive paperwork requirements the regulation imposes on all contractors are unduly burdensome and should be simplified.

Sincerely,

A handwritten signature in cursive script, reading "Barry C. Beringer". The signature is written in dark ink and is positioned above the printed name and title.

Barry C. Beringer
Associate Under Secretary
for Economic Affairs

PERKINS COIE

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March 28, 1990

Defense Acquisition Regulatory Council
ATTN: Mr. Charles W. Lloyd
Executive Secretary
DAR Council, ODASD(P)/DARS
c/o OASD(P&L)(MRS)
Room 3D139
The Pentagon
Washington, D.C. 20301-3062

Re: DAR Case 87-303

Dear Mr. Lloyd:

Please find enclosed a letter dated April 18, 1989, which I wrote to Mr. Jack Townsend on the subject of rights in patentable computer software developed under government contracts. Although the letter addresses the civilian FARS as well as the Department of Defense's technical data rules, I hope you will take the applicable points into consideration in your revisions to 48 CFR Parts 227 and 252.

Thank you for your consideration.

Very truly yours,

Cassie Phillips

Catherine L. Phillips

CLP:cgp
Enclosures
8582G

Disc

JOHN C. BECKETT
260 Coleridge Avenue
Palo Alto, California 94301

CONSULTING SERVICES
MANAGEMENT, TECHNICAL REGULATIONS
AND FEDERAL PROCUREMENT

(415) 321-8844 RESIDENCE
(415) 857-2260 HEWLETT PACKARD
(415) 493-1553 ALPHA FUND

April 6, 1989

Mr. Duncan Holiday
USD(A) Procurement Reform
The Pentagon, Room 3D765
Washington D.C. 20301

87-303

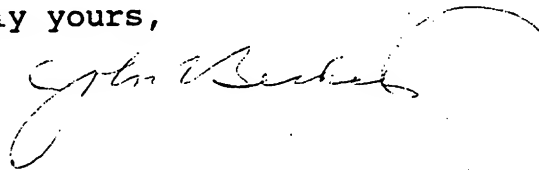
Dear Duncan:

Recently LMI sent a follow up letter to Mr. Packard on LMI's 1986 report to the Commission on technical data rights. This letter attempts to correct any misunderstanding on what LMI intended in their carefully worded limitation to protection of data developed exclusively at private expense where there is a performance requirement.

I understand that this letter was developed in concert with Len Rowicz. Since the original may never reach your desk, I thought I'd send you a copy.

Sincerely yours,

cc William J. Perry



87-303

JOHN C. BECKETT
260 Coleridge Avenue
Palo Alto, California 94301

CONSULTING SERVICES
MANAGEMENT, TECHNICAL REGULATIONS
AND FEDERAL PROCUREMENT

(415) 321-8844 RESIDENCE
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(415) 493-1553 ALPHA FUND

September 30, 1988

Mr. Duncan Holiday
USD(A) Procurement Reform
The Pentagon, Room 3D765
Washington D.C. 20301

Dear Mr. Holiday: *Duncan*

Since your fine presentation on a proposed new rule on technical data rights, I have been researching the Packard Commission study by LMI. Your reference is appropriate and I believe the LMI report is correct. However, it does appear that a broader interpretation is being made than intended.

I have discussed this with Mark Flanigan at LMI. He was closely involved in the study and I worked with him from the Commission staff. The recommendation #2 which appears on page 121 of the Appendix reads as intended- "At private expense means that the funding for development work has not been reimbursed by the government, or such work was not required as an element of performance under a research or development government contract or subcontract". In my view, unless there was a specified research or development effort in the contract or subcontract it's private. In other words, innovation for production is not a development element of performance, particularly if the item is workable as conceived. (See also page 139).

In my experience, modified commercial seldom requires development. The modification typically involves military hardening, different housing or such. The normal practice for commercial items should apply.

I'm in favor of getting the new rule out as soon as possible. If there are some refinements coming from CODSIA, fine but on the whole I think you have done a good job.

Sincerely yours,

John C. Beckett

cc Greg Pekhoff, SAF/GCP



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

November 28, 1988

Mr. Charles Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
OASD (P) DARS,
Room 3D139
The Pentagon
Washington, D.C. 20301-3062

Re: DAR Case 87-303, Patents, Data, and Copyrights

Dear Mr. Lloyd:

These are the comments of the Chief Counsel for Advocacy of the U.S. Small Business Administration in response to the October 28, 1988 interim rule on the ownership of patents, data, and copyrights under Department of Defense contracts (53 Fed. Reg. 43698). The October interim rule is a vast improvement over the interim rule issued on April 1, 1988. The changes which the DAR Council has made in the rule, such as eliminating the "list or lose" provisions, should reduce burdens and provide substantial benefits to small business prime contractors and subcontractors. While I am generally satisfied with the content of the interim rule, I am commenting on several areas where improvements can still be made. Finally, while the DAR Council has performed a regulatory flexibility analysis of the rule, this analysis is inadequate for the task of assessing impacts on small firms.

The Office of Advocacy supports expanding contractor rights in technical data for commercial purposes and agrees that the Government should make every effort to protect these rights. The October interim rule recognizes that the process of establishing rights in technical data is complex and sensitive for contractors and must be dealt with through a flexible negotiating process, without draconian regulatory procedures or deadlines.

This interim rule implements changes required under Section 808 of the Small Business Act, 15 U.S.C. 100-180 and Executive Order 12591. The rule also addresses DAR Case 87-37 concerning non-disclosure agreements initiated in the April 16, 1987 partial final rule (52 Fed. Reg. 12391). The Office of Advocacy commented extensively on the April 1988 interim technical data

rulemaking and supports the two goals embodied in that rule: contractor ownership of commercial rights in technical data and government ability to use most technical data for procurement, repair or maintenance.

The April 16, 1987 final rule created a new class of rights called Government Purpose License Rights (GPLR). The April 1, 1988 interim rule expanded GPLR and also implemented Section 808 and E.O. 12591, which call for expansion of contractor rights in technical data to a greater extent than the April 16, 1987 final rule. The April 1988 rule also reflected Section 808's prohibitions on forcing contractors to relinquish rights in data developed at private expense, prime contractors use of economic power to force subcontractors to relinquish rights in technical data, and its encouragement of contractors to license their data to third parties for both commercial and governmental purposes.

These strictures complicate acquisition and dissemination of data, however, and the various contracting activities must initiate procedures which ensure that when small firms require technical data to bid on solicitations, complete data packages must be available for timely dissemination with the bid packages or very soon thereafter. In addition, any direct licensing scheme must ensure adequate opportunity for open competition among the potential licensees. The October interim rule is a step in the right direction, but it does not clearly answer these small business concerns about technical data in the procurement process.

The Definition of "Required as an Element of Performance Under a Government Contract or Subcontract" is Overly Broad

The definition of "Required as an Element of Performance Under a Government Contract or Subcontract" contains the following operative clause "...the development was specified in a Government contract or subcontract or that the development was accomplished during and was necessary for performance of a government contract or subcontract." (53 Fed. Reg. 43700 (emphasis added)). This may introduce unnecessary uncertainty into the technical data procurement process. The definition should read "...the development was specified in a Government contract or subcontract," with the final clause deleted.

An overly broad definition which involves often subjective determinations regarding what was "necessary" under a Government contract -- as opposed to that which was actually specified -- combined with the requirements for pre-award notice, post-award notice, and technical data lists, will

create an unnecessary paper flow and needless negotiations. Contractors may be forced to try to establish rights in any newly developed items which the Government may later claim to have been "necessary" for performance. Consequently, contracting officers will be forced to negotiate rights not only in items delivered under the contract but in items which may have a tangential relationship to the deliverable item.

For example, if a contract calls for equipment to be accurate within a certain tolerance and the contractor develops a testing device to determine if this tolerance is met, the question becomes whether the development of this testing device was "necessary" for performance. Faced with this uncertainty, a cautious and prudent contractor would assert rights in the item, thus beginning another negotiation cycle. Due to the already heavy paperwork flow and complexity of the technical data rule, this extra uncertainty should be removed.

Deferred Ordering Procedures are Unclear

One of the options provided to contracting officers under the interim regulations is to defer ordering of technical data from the contractor for up to three years after delivery of the item. This option allows contracting officers to "hedge their bets" on procurement of technical data even after the pre- and post-award negotiation process is completed. Deferred ordering of technical data can create record-keeping difficulties for contractors, particularly small prime contractors and subcontractors, because the status of their technical data will remain uncertain for three years after delivery to the Government. Therefore, the DAR Council should limit use of this clause to only those situations where substantial uncertainty exists as to future governmental need for the data.

In addition, neither the deferred ordering regulation (Section 227.475-2(c)) nor the applicable clause (Clause 252.227-7027) is clear on how or under what procedures deferred ordering will be conducted. Both the regulation and clause should be changed to specify that the procedures for determining rights in technical data in a deferred ordering situation will be the same as Section 227.472 "Acquisition Policy for Technical Data and Rights in Technical Data." This change would alert contracting officers to the fact that deferred ordering of technical data still requires negotiation of rights. It would also put contractors on notice that they have an obligation to keep records on the development of items which may later be subject to deferred ordering.

The Initial Regulatory Flexibility Analysis of the Interim Rule is Inadequate to Assess Impacts of the Rule

The DAR Council produced a revised Initial Regulatory Flexibility Analysis (IRFA) of the interim rule. However, this analysis is merely a listing of the rule's main provisions followed by a very brief, qualitative discussion of the expected impacts on small businesses. While I believe that on the whole the rule will benefit small businesses and that many of these benefits are difficult to quantify, the IRFA submitted with the interim rule is not a useful analysis of the rule or alternatives considered by the DAR Council.

For example, the Council recognizes that the requirements of the rule will impose significant paperwork and administrative burdens on small businesses. In fact, the paperwork clearance request (SF-83) for the rule estimates that 74 hours of paperwork per claim will be required to assert rights in technical data. This burden is not mentioned in the IRFA although it is clearly a requirement of the regulation and is already quantified. The Council should include paperwork costs, other direct costs, and any mitigating cost factors, such as commercial practices for protection of trade secret information, in its final regulatory flexibility analysis.

Conclusion

The October interim rule has eliminated many of the most objectionable features of the April 1988 rule; however, the procedures for establishing rights in technical data are still very complicated. Implementation of these regulations should be monitored by the DAR Council to ensure that the Services are carrying them out in a uniform and fair manner. I believe that once these rules are fully in place and the process is assimilated by the contracting community, the Government, contractors and the American economy will benefit from this regulation.

Your very truly,



Frank S. Swain
Chief Counsel for Advocacy



Control Systems

NWL Control Systems
2220 Palmer Ave., Kalamazoo, MI 49001-4165
(616) 384-3501/3400

William F. Grun
President

1 August 1989

The Honorable Elenor R. Spector
Deputy Assistant Secretary of Defense
For Procurement
Room 3E144
The Pentagon
Washington, DC 20301

Dear Madam:

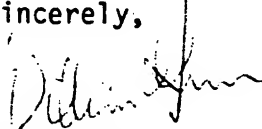
I am enclosing a letter from Sundstrand Corporation to Mr. Duncan Holiday, Director of the Defense Acquisition Regulatory Council, which proposes certain modifications to the October 1988 (Interim) Tech Data Rules.

We at NWL Control Systems have been working with the Pentagon through the CODSIA Council for about five years. I feel the Sundstrand letter well represents NWL's position and reflects the concerns of all innovative second tier aerospace contractors.

Privately funded R&D is an absolute necessity at our level. It not only is the means for advancing the state of the science for our national defense, it is the essential ingredient of a second tier supplier's continuing competitiveness. But privately funded R&D is expensive. Therefore, recoupment of those expenses during subsequent production is not merely justified; it is essential to the continued livelihood of our I urge you to incorporate in your upcoming DOD Rules the language of the 1988 (interim) Tech Data Rules, as amended by the proposal of the enclosed Sundstrand letter.

Thank you for your interest in this very important matter.

Sincerely,


(William Grun
President

PAUL J. GROSS*
Vice President
Rexnord Inc.
Specialty Fastener Division
Chairman, PIA

ALLEN V. C. DAVIS*
President
Custom Control Sensors

JOHN A. FARRIS
Vice President
Pall Corporation

DONALD R. FLUMAN*
Manager, Contracts
Sterer Eng. & Mfg. Co.

DAVID B. HODGES
Director, Contract Administration
ITT Aerospace Controls Division

PAUL L. KEARNEY
Director, Contracts
Allied-Signal
Aerospace Company

FLOYD G. KOLLER
President
Auto-Valve Inc.

DOUGLAS M. LONGYEAR*
Vice President,
Business Development
Hydro-Aire Div., Crane Co.

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Director of Administration
Vacco Industries

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President
PneuDraulics, Inc.

SCOTT F. WYLIE
Director Government &
Community Relations
Raychem Corporation

*Member, Executive Committee

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BETTIE S. MCCARTHY
Washington Representative

PROPRIETARY INDUSTRIES ASSOCIATION

Innovation at
Private Expense

733 15th Street, NW, Suite 700
Washington, DC 20005
(202) 393-0020 (703) 241-0268 FAX (202) 638-4118

P 88-127
DARS

JACK TOWNSEND

June 20, 1989

Mrs. Eleanor Spector
Deputy Assistant for Procurement
and Logistics
Office of the Secretary
Department of Defense
The Pentagon
Room 3E144
Washington, D.C.

87-303

Dear Eleanor:

Thank you for taking the time to discuss the rights in technical data issue with me today.

I was glad to hear that you believe there is merit in the idea of restricting the definition of "required for performance of a Government contract or subcontract" to a contract or subcontract with the developer. A definitional problem remains, from our perspective, if the test of "accomplished during and necessary to perform" remains in that definition.

As we discussed, modifications to an existing product or process performed while under a subcontract to produce, and not charged as direct costs, can result in a loss of rights to the whole product or process -- the way the other definitions are fashioned. In other words, when an unpriced modification occurs under contract, the modification could be "necessary to perform". If that is the case, then the item, component or process can fit the definition of "developed exclusively with Government Funds."

Perhaps the larger concern, however, is that a company loses the right to control the use, release and disclosure of tech data, when it has not sold development. I'm sure that many subcontractors would learn to try to sell development to the prime contractor, but in an era of tight budgets I'm not sure that is in anyone best interests.

In any event, I appreciate your willingness to continue the exchange.

With best wishes

Bettie S. McCarthy

06 JUL 1989

Sundstrand Corporation



PLEASE REPLY TO
EASTERN DISTRICT OFFICE
SUITE 2400
1000 WILSON BOULEVARD
ARLINGTON, VA 22209
PHONE 703/276-1626
TWX 710 955-0612

CORPORATE OFFICES • ROCKFORD, ILLINOIS 61125

9 May 1989

Mr. Duncan Holaday
Director, Defense Acquisition Regulatory Council
ODASD (P)/DARS
The Pentagon
Washington, D.C. 20301-3062

Dear Duncan:

I appreciate the time you and Jack Townsend took to meet with the CODSIA Tech Data working group. I thought the exchange on the critical issue of the definition of "Required in the Performance" was mutually valuable.

During that meeting, I made an offer to modify that definition, and couple it with an expansion of the notification provisions already provided for in the rule. With these changes, I believe the "industry's" concern with this definition can be mollified, while the Department's concerns with "cherry-picking" can be addressed at the right time — and through a more appropriate mechanism.

My draft of that offer is enclosed. It has been reviewed by the CODSIA representatives present at our joint meeting.

After you have had the opportunity to review the writing, I would ask for an opportunity to meet with you, Jack and any other DoD official, to explain more fully the philosophy behind the words, and my intent with these words. It is likely that we are not that far off on this matter.

Let me reiterate one other point we made at the meeting. While the definitions are critical, we had previously discussed several other modifications to the October interim rule. All of those issues were part and parcel of our CODSIA presentation.

Thank you in advance for your attention to this matter. If I can provide you with any additional information, please call me.

Sincerely,

Alan L. Chvotkin
Senior Corporate Attorney

ALC/k

PROPOSED MODIFICATION TO OCTOBER, 1988 TECH DATA RULESDefinitions (227.471)

In the definition of "developed" add "(or "development")" after the first word "developed".

In the definitions, add a new definition of "developer" as follows:

"Developer", as used in this subpart, means the entity that developed the item, component, or process.

In the definition of "Developed Exclusively with Government Funds", strike "or that the development was required for the performance" and insert "or was required for the performance of any government contract or subcontract with the developer".

In the definition of "Developed Exclusively at Private Expense":

- in the first sentence, strike "Government and that the development was not required" and insert "Government and was not required".
- in the first sentence, add before the period "with the developer".
- in the second sentence, strike "Independent" and insert "Development charged as independent".
- in the second sentence, strike "at private expense" and insert "developed exclusively at private expense".
- strike the third and fourth sentences and insert the following:
 "Development charged as indirect costs are considered "developed exclusively at private expense" when development was not required for the performance of a government contract or subcontract with the developer. All other development charged as indirect costs are considered "developed exclusively with government funds" when development was required for the performance of a government contract or subcontract with the developer."

In the definition of "Required for the Performance", amend it to read "means, in connection with an item, component or process, that its development was specified in a government contract or subcontract with the developer."

In 227.473-1(a)(1), strike all after the dash and insert:

- "(i) Have been developed exclusively at private expense;
- (ii) Have been developed in part at private expense;
- (iii) Will be developed exclusively at private expense during, and necessary for the performance of, this government contract or subcontract with the developer; or
- (iv) Embody the technology developed exclusively with Government funds for which the developer requests the Government to grant exclusive commercial rights.

Items, components and processes that will be developed pursuant to (iii) shall be identified to the Government as early as possible, regardless if data is required to be delivered as part of the Government contract. No other items, components or processes need to be identified if technical data subject to restrictions on the Government's right to use or disclose the data is not required to be delivered as part of the Government contract".

"(iii) During the life of the contract, when notification is provided to the contracting officer of the intent to use of an item, component or process identified in paragraph (1)(a)(1)(iii) above, such notification shall identify reasonable alternative means, if any, of achieving the performance requirements of the contract. If the contracting officer does not reject the use of such item, component or process for which notice has been provided within "X"(30) days, the contractor or subcontractor may proceed with the use of such item, component, or process."

NOTE: Corresponding changes will have to be made to the 7013 clause.

or "DEVELOPMENT"

①
"Developed", as used in this subpart, means that the item, component, or process exists and is workable. Thus, the item or component must have been constructed or the process practiced. Workability is generally established when the item, component or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended. Whether, how much, and what type of analysis or testing is required to establish workability depends on the nature of the item, component, or process, and the state of the art. To be considered "developed", the item, component, or process need not be at the stage where it could be offered for sale or sold on the commercial market, nor must the item, component or process be actually reduced to practice within the meaning of Title 35 of the United States Code.

Definitions (227,471)

In the definition of "developed" add "(or "development")" after the first word "developed".

patents terms

In the definitions, add a new definition of "developer" as follows:
"Developer", as used in this subpart, means the entity that developed the item, component, or process.

NOTE: Corresponding changes will have to be made to the 7013 clause.

"Developed Exclusively with Government Funds" as used in this subpart, means, in connection with an item, component, or process, that the cost of development was paid for in whole by the Government or ~~that the development was required for the~~ performance of a Government contract or subcontract with the developer.

(2)

In the definition of "Developed Exclusively with Government Funds", strike "or that the development was required for the performance" and insert "or was required for the performance of any government contract or subcontract with the developer".

WITH THE
DEVELOPER.
CHARGED AS

"Developed Exclusively at Private Expense", as used in this subpart, means, in connection with an item,

component, or process, that no part of the cost of development was paid for by

the Government and ~~that the~~

~~development~~ was not required for the performance of a Government contract

or subcontract. Independent research and development and bid and proposal costs, as defined in FAR 31.205-18

(whether or not included in a formal independent research and development program), are considered to be at **DEVELOPED EXCLUSIVELY AT**

private expense. All other indirect costs of development are considered

~~Government funded when development was required for the performance of a Government contract or subcontract.~~

~~Indirect costs are considered funded at private expense when development was not required for the performance of a Government contract or subcontract.~~

Development charged as indirect costs are considered "developed exclusively at private expense" when development was not required for the performance of a government contract or subcontract with the developer. All other development charged as indirect costs are considered "developed exclusively with government funds" when development was required for the performance of a government contract or subcontract with the developer.

In the definition of "Developed Exclusively at Private Expense":

- in the first sentence, strike "Government and that the development was not required" and insert "Government and was not required".
- in the first sentence, add before the period "with the developer".
- in the second sentence, strike "Independent" and insert "Development charged as independent".
- in the second sentence, strike "at private expense" and insert developed exclusively at private expense".
- strike the third and fourth sentences and insert the following:
"Development charged as indirect costs are considered "developed exclusively at private expense" when development was not required for the performance of a government contract or subcontract with the developer. All other development charged as indirect costs are considered "developed exclusively with government funds" when development was required for the performance of a government contract or subcontract with the developer."

41
"Required for the Performance of a Government Contract or Subcontract", as used in this subpart, means, in connection with ~~the development of~~ an item, component, or process, that the ITS development was specified in a ^{with the developer} Government contract or subcontract ~~or that the development was accomplished during and was necessary for performance of a Government contract or subcontract.~~

In the definition of "Required for the Performance", amend it to read "means, in connection with an item, component or process, that its development was specified in a government contract or subcontract with the developer."

227.473-1 Procedures for establishing rights in technical data.

(a) *Notification requirements.*—(1) *Background.* Offerors and contractors are required by 252.227-7013(j) to notify the Government of any asserted restrictions on the Government's right to use or disclose technical data or computer software. This notice advises the contracting officer of the contractor's or any subcontractor's intended use of items, components, processes, or computer software that—

~~(i) Have been developed exclusively at private expense;~~

~~(ii) Have been developed in part at private expense; or~~

~~(iii) Embody technology developed exclusively with Government funds for which the contractor or subcontractor requests the Government to grant exclusive commercial rights. Items, components, or processes do not need to be identified if no technical data is required to be delivered or if the required technical data will be delivered with unlimited rights.~~

In 227.473-1(a)(1), strike all after the dash and insert:

- "(1) Have been developed exclusively at private expense;
- (ii) Have been developed in part at private expense;
- (iii) Will be developed exclusively at private expense during, and necessary for the performance of, this government contract or subcontract with the developer; or
- (iv) Embody the technology developed exclusively with Government funds for which the developer requests the Government to grant exclusive commercial rights.

Items, components and processes that will be developed pursuant to (iii) shall be identified to the Government as early as possible, regardless if data is required to be delivered as part of the Government contract. No other items, components or processes need to be identified if technical data subject to restrictions on the Government's right to use or disclose the data is not required to be delivered as part of the Government contract".

227.473-1(a)(3)
(3, Contract award. (i) The contractor's notification will serve as the basis for the list to be included in the contract identifying all technical data with restrictions on the Government's right of use or disclosure that is required by paragraph (k) of the clause at 252.227-7013.

(ii) During the life of the contract, this list will be updated as needed to address additional assertions by the contractor or subcontractors under the notification process, to incorporate the results of Government reviews and challenges, and to specifically identify or describe all technical data to be delivered with restrictions on the Government's rights of use or disclosure. Also, during contract performance, changing conditions may require bilateral modifications of the list.

(iv) (iii) The purpose of the list is to facilitate the review of contractor assertions required by 10 U.S.C. 2321 and to provide a basis for Government acquisition planning. It is not a final determination of rights and does not alter the rights of the parties under 10 U.S.C. 2320 or 2321.

In 227.473-1(a)(3), redesignate (iii) as (iv) and add a new (iii) as follows:

"(iii) During the life of the contract, when notification is provided to the contracting officer of the intended use of an item, component or process identified in paragraph (1)(a)(1)(iii) above, such notification shall identify reasonable alternative means, if any, of achieving the performance requirements of the contract. If the contracting officer does not reject the use of such item, component or process for which notice has been provided within "X"(30) days, the contractor or subcontractor may proceed with the use of such item, component, or process."



LOGISTICS MANAGEMENT INSTITUTE

6400 GOLDSBORO ROAD, BETHESDA, MARYLAND 20817-5886 (301) 320-2000

31 March 1989

Mr. David Packard
Chairman
President's Blue Ribbon Commission
on Defense Management

Dear Mr. Packard:

Jack Beckett tells me that questions remain about the definition of "developed at private expense" given in The Department of Defense and Rights in Technical Data, which was prepared by LMI for the Commission and appears as Appendix I of the Final Report. I have discussed the matter with Len Rawicz, the co-author, to make sure we are in agreement, and can state the following:

- When we included IR&D and B&P within the term "private expense," we noted that "certain other expenditures reimbursed as indirect costs probably should also be included within the meaning of 'private expense,' but determining which costs these are will require further analysis." Thus the definition specifies what, as a minimum, should be embraced by the term, leaving the possibility that some other types of indirect costs might qualify as private expense.
- The definition defines "private expense" by specifying two categories of development work as not being at private expense:
 - Development work whose funding has been reimbursed by the Government.
 - Development work done as a required element of performance under an R&D contract (or subcontract).
- Our reason for excluding work "required as an element of performance under an R&D government contract or subcontract" was to prevent contractors from claiming, when the contractor's development costs under an R&D contract exceed the amount paid by the Government for development work required under that contract, that the contractor's loss represents private expense devoted to the development work. We spoke specifically to R&D contracts and used "required" in the sense of "specified in the contract as a contract requirement."

I hope that these clarifications will help in dispelling any uncertainty regarding the intended meaning of the Appendix I definition of "developed at private expense."

Mark Flanigan
Mark Flanigan

87-303

H720

6 MAR 1989

Aerospace Industries Association
Mr. LeRoy Haugh
1250 Eye Street, N.W.
Washington, DC 20005

Dear Mr. Haugh:

Reference is made to AIA's letter of 1 February 1989 to Lieutenant General John T. Myers, Director, Defense Communications Agency (DCA). The letter voiced concern on the use of "Government Data and Usage Rights" clause in a Request for Proposals (RFP).


After your office identified the document in question as a Request for Information (RFI) rather than a Request for Proposal (RFP) as indicated in your letter, we were able to analyze the situation.

The RFI was synopsisized, a draft statement of work which included the "Government Data and Usage Rights" clause in question was provided to respondents, and DCA conducted an Industry Briefing to highlight the technical and programmatic documentation. As a result, Industry responded with numerous questions.

At this time, DCA and the Air Force Communications Command (AFCC), Scott Air Force Base, Illinois, are combining efforts to analyze all the comments received from Industry and to make appropriate changes prior to issuance of an RFP. We are also forwarding a copy of your comments to the contracting community for their consideration. The contracting community will keep you informed of the final disposition of data right clauses. I can assure you the RFP will be in compliance with laws and regulations. My staff will be in touch with you until the issues are resolved.

I wish to thank you for your concern about this issue and assure you that every consideration will be given so as not to infringe on contractor's proprietary rights in computer software.

FOR THE DIRECTOR:


DENNIS W. GROH
Deputy Director
Acquisition Management

Copy to:
The Office Of The Assistant Secretary of Defense,
Director Defense Acquisition Regulatory System



National Aeronautics and
Space Administration

Washington, D.C.
20546

87-303
Discussion

FEB 1 1990

Reply to Attn of: GP (89-120)

Ms. ~~Eleonor~~ R. Spector
Deputy Assistant Secretary of Defense
for Procurement
Room 3E144
Pentagon
Washington, DC 20301-8000

RE: Coverage of Rights in Data and Copyrights in the Federal
Acquisition Regulation

Dear Ms. Spector:

This letter is to express objection to any decision to make the current DFARS Interim Rule the base document from which to prepare FAR coverage of rights in data and copyrights for all agencies. The basic reason is that the DFARS Interim Rule is too narrowly focused in order to meet DOD-unique reprocurement needs (and in particular to implement the requirements of Section 808 of Pub. L. 100-180), and accordingly is inadequate or incomplete as a base document to meet a number of needs of other agencies. Furthermore, in meeting these DOD-unique needs and requirements, the DFARS Interim Rule adopts standard approaches that have the potential of becoming unnecessarily time consuming and burdensome for other agencies that normally do not have the same needs and requirements.

I recognize that the DOD-unique needs, including the requirements of Section 808 of Pub. L. 100-180, have to be fully addressed in the FAR. However, given the universal applicability of the FAR, the DOD-specific coverage should be part of a much broader-based and more flexible approach in order to accommodate the statutory, mission, and programmatic requirements and needs of all agencies. At present the DFARS Interim Rule is inadequate or incomplete in at least the following areas:

- o In the treatment of computer software and related documentation, the DFARS (which DOD itself agrees is inadequate and contains many inconsistencies) either should be substantially revised and updated, or the subject should be deleted and included in separate, independently developed regulations.

- o The treatment of copyright in the DFARS (for computer software as well as other data) needs to be revised to afford more meaningful commercial rights to contractors asserting copyright to data generated under the contract or delivered to the Government; clearer guidelines are needed to clarify when, consistent with agencies' dissemination and technology transfer objectives, copyright may be asserted; and the use of the "work-for-hire" doctrine, which appears to be unlawful under 17 U.S.C. 201 (b), must be reassessed.
- o There needs to be an option to permit a contractor to withhold (rather than deliver) data resulting from privately funded activities. This is the preferred approach (and the one most protective of private rights) in many civilian agency procurements.
- o The treatment of data rights must allow a flexible and less burdensome approach when the aim of the contract is a report of research results and not end-item components and processes for which follow-on procurements are anticipated.
- o Although agencies subject to Section 808 Pub. L. 100-180 will often need to be involved in mixed funding situations which necessitate extensive negotiations and could result in the compromise of private commercial rights, the same is rarely true for other agencies. The situation is worse for agencies like NASA which also have important information dissemination and technology transfer missions. The DFARS Interim Rule, appears to maximize rather than minimize such occurrences.
- o Clearer guidelines and more flexibility are needed regarding the use of Government Purpose License Rights and the interrelation of such rights to the technology transfer and dissemination activities and programs of the civilian agencies.

Obviously, the above areas, as well as the DOD-unique requirements of P.L. 100-180, need to be adequately and fully addressed in any Government-wide regulation for use by all agencies. Most of the above mentioned areas are now adequately addressed in FAR 27.4. NASA feels that FAR 27.4 has worked very well, and believes the other civilian agencies agree. Thus, any decision to adopt the DFARS Interim Rule as the base document for the FAR should be contingent on a commitment that the Interim Rule will be modified to incorporate all the sections of FAR 27.4 which are needed to avoid disruption of the approaches and processes that are now working well for the civilian agencies.

In any event, whether the DFARS Interim Rule or FAR 27.4 is used as a base document for future FAR coverage, extensive changes will be required. This includes implementation of the requirements of Section 1.(b)(6) of Executive Order 12591. One potential method of proceeding now, in a way calculated to permit meaningful analysis, and thought, would be for NASA and the other civilian agencies to immediately implement the requirements of Section 1.(b)(6) of the Executive Order in agency FAR supplements. This will bring the agencies into compliance with E.O. 12591 and allow all agencies more time for the needed assessment of the areas discussed above so that whatever the final version of FAR 27.4 becomes, the needs of all agencies can be adequately and fully addressed in a manner least disruptive and burdensome to all agencies.

Sincerely,



Stuart J. Evans
Assistant Administrator
for Procurement

• DIRECTORS 1988 - 1989 •

PAUL J. GROSS*
Vice President
Reinord Inc.
Specialty Fastener Division
Chairman, PIA

ALLEN V. C. DAVIS*
President
Custom Control Sensors

JOHN A. FARRIS
Vice President
Pell Corporation

DONALD R. FLUMAN*
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Business Development
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Raychem Corporation

*Member, Executive Committee

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Innovation at
Private Expense

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0704-0240

January 11, 1989

Ms. Eyvette Flynn
Office of Information and Regulatory Affairs
Office of Management and Budget
726 Jackson Place, NW, Room 3235
Washington, D.C. 20503

Re: OMB Control Number 0704-0240

Dear Ms. Flynn:

The Proprietary Industries Association welcomes the opportunity to comment on the paperwork burden of the revised interim regulation on rights in technical data published on October 28, 1988. As you know, the revised interim rule on rights in technical data replaced the April, 1988 interim regulation which was the subject of public comment on its information collection and paperwork requirements earlier in 1988.

Although the interim regulation has been improved -- both substantively and in tone -- the information collection burden on government and industry has not changed significantly. DOD's request for OMB clearance acknowledges that similarity. For that reason, a copy of our survey on the information collection burden are enclosed. These comments are still valid.

We still believe that DOD has significantly underestimated the burden, the burden imposed is not required by law, is excessive and unnecessary for DOD to accomplish its mission. DOD does not need to have unlimited rights in limited rights data beyond that granted in law to accomplish most of its day-to-day responsibilities. The number of competitors of identical items will be increased by the ability to freely disseminate technical data but it is not at all clear that one of the major goals of competition -- government savings -- is enhanced. In fact, some economic research is beginning to indicate that transfer of technical

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data for items developed at private expense may actually increase long-term program costs.

For that reason, we believe DOD's formulation may actually increase costs to government, substantially -- both in terms of contractors' and subcontractors' business response to the parts of the regulation, and by virtue of the overhead costs associated with the regulations.

To a great degree, the burden is driven by the definitions of "developed exclusively with government funds", "developed exclusively at private expense" and "required for performance of a Government contract or subcontract."

As currently written, those definitions create a benchmark against which to measure "developed exclusively at private expense" for already developed products. That bench mark has little caselaw to support it and does not even closely resemble what the industry has perceived (and perceives) to be developed at private expense since the 1960s.

Further, the regulations skirt the Congressional direction given in 1987 on defining "at private expense" in its definition of "developed exclusively at private expense."

In the Conference Report accompanying P.L. 99-500 the conferees write that:

"the conferees agree that as a matter of general policy "at private expense" development was accomplished without direct government payment."

The Conference report states further that:

"The Department of Defense should generally seek to acquire the same rights in data that a commercial customer would in acquiring the same product.
....If a contractor were to purchase an item in the commercial sector, it would not receive unlimited rights to use, release or disclose technical data necessary to manufacture the item or perform the necessary processes to manufacture the item."

The definition proposed in the October 28, 1988 interim

regulation makes no distinction between firm fixed price contracts to deliver hardware (the situation described above) or contracts where development is an explicit requirement in the contract or subcontract.

Contractors and subcontractors are and have been required to be able to justify claims of rights in technical data. However, in the past, private expense developers believed they could justify limited rights claims if their contracts or subcontracts allowed them limited rights, and that they accepted no payment for "design and development".

Records to show that any design and development work performed was "not accomplished during" and was "not necessary to perform the contract or subcontract" were not contemplated. This is particularly true for companies who sold to prime contractors under firm-fixed price purchase orders to deliver hardware.

Contractors and Subcontractors will have to go back in time to trace each identifiable subpart of a product or process to determine when it was used, if it was modified while the contractor or subcontractor was performing a contract and if the product improvements were necessary to perform.

For example, a sensor that was designed ten years ago may have been used in 18 different products sold to the government since its invention. However, that sensor has changed slightly in shape, the manufacturing process has been improved, and the alloy out of which the casing for the sensor is made has been changed. A manufacturer will have to trace the improvements and applications engineering performed on that sensor, and verify that none of the improvements made were "necessary to perform a Government contract or subcontract." Records demonstrating that the supplier did not charge for development are extraneous, until this condition has been met.

Since minor modifications to existing products are the standard in the development of a major weapons system, contractors and subcontractors will face a voluminous task if they choose to protect limited rights assertions.

On the other hand, because the task is so overwhelming, many

contractors and subcontractors (particularly small companies or smaller divisions of larger companies who do not rely heavily on DOD contracts) may choose not to even attempt to put their historical records in this form. Many of these companies will simply refuse to deliver technical data, no bid, or lose their rights in technical data.

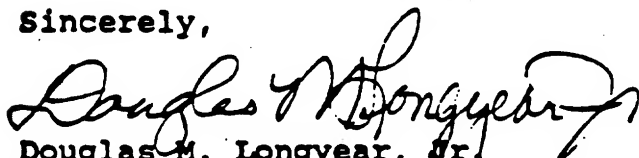
Products and processes yet to be designed may not be offered to defense markets if the opportunity to retain intellectual property rights in trade secrets cannot be protected. Aggressive enforcement of the definition may also affect prices of already developed products. A company who expects to lose trade secrets to their competition will increase the price of the product if at all possible. PIA has commented to the DAR Council on this aspect of the definitions as well. A copy of those comments is enclosed. A press release from the California Institute of Technology, reporting on a recent economic study of strategic business behavior under a similar policy is also enclosed. The bottom line is that this kind of an approach may prove costly to government in terms of dollars and technology.

The overhead burden associated with the reporting and record keeping requirements promise to be costly as well. In their request for clearance, DOD estimates that 60,000 contracts with data requirements were awarded in 1987. At the same time, they estimate the number of respondents to be 16,560. The appropriate number of contract actions directly between the government and a contractor are somewhere in between these numbers.

What is clear is that these estimates could not reflect subcontracts made under these contracts. In a major weapons systems development program there may be hundreds of subcontractors signed up. The total cost projected by DOD could not reflect these costs. Our comments to OIRA on the April, 1988 interim regulation reflected PIA estimates of manhours and cost for our limited segment of the subcontractors alone. The numbers are overwhelming, unnecessary and counterproductive.

As a consequence , PIA urges the Office of Information and Regulatory Affairs to use whatever authorities it has to refuse clearance to the regulations as long as these definitions remain unchanged. If any temporary clearance is granted these regulations, we would urge you to clarify the meaning of development to exclude product improvements and applications engineering as a condition of granting that. Our other concerns are set forth in our comments to the DAR Council.

Sincerely,


Douglas M. Longyear, Jr.
President

APPENDIX A

**THE PROPRIETARY INDUSTRIES ASSOCIATION
SURVEY OF ADMINISTRATIVE BURDEN
ASSOCIATED WITH THE RIGHTS IN TECHNICAL DATA REGULATIONS**

AUGUST, 1988

DOD ESTIMATES

PIA ESTIMATES

(for lower tiers)

No. of respondents 16,500

1,000 *1

**No. of responses
per respondent
per year 1**

94 *2

**No. of hours
per response 84**

(a) 143 hrs to satisfy requirements at 227.473-4 and clauses at 252.227-7028 and 7038 (April, 1988) per respondent. Implied at 227.473-1(a)(5) and 252.227-7013(j) (Oct., 1988). *3

(b) 112 hrs to negotiate rights in technical data. (227.472-3, and 227.473(b)(2) before factoring in the definitions at 227.471, April, 1988). At 227.472-3(B)(2) and 227.473-1(c), Oct., 1988, before factoring in the definitions in 227.471. *4

255 Hours Total

**TOTAL ANNUAL
REPORTING HRS**

1,391,040

14,494,800

***5**

(6)

- (*1) Assumes 1,000 lower tier suppliers who develop at private expense. An alternate calculation could be derived by assuming burden on a per contract basis. The top 500 R&D defense contractors received 1,289 awards in 1967. Assuming 15 subcontracts involving deliverable technical data for items developed at private expense, per prime contract award; and assuming at least 2 responses to each subcontract solicitation, the Total Annual reporting hours might be

$$[(19,335 \times 255) + (19,335 \times 143)] =$$

$$4,930,425 + 2,764,905 = 7,695,330$$
- (*2) Based on responses to a survey of PIA members, 18 companies responded to an average of 94 solicitations per year which require delivery of technical data and which contain technical data clauses. All of these companies have historically developed product exclusively at private expense.
- (*3) The regs essentially move the validation process to the beginning of the contracting process by virtue of the certifications process. Based on past experience, PIA member companies averaged 143 hours per validation.
- (*4) To negotiate rights in technical data clauses. PIA member companies reported an average of 112 hours per subcontract, in recent years.
- (*5) Assumes companies successfully compete for 10% of the 94 subcontracts for which proposals are submitted. Calculation

$$[(\# \text{ respondents} \times \text{number of responses} \times 142) + (\# \text{ respondents} \times 9.4 \times 112)]$$

Estimated Cost to Industry

	<u>DOD - Tech Data est.</u>	<u>PIA - Tech Data est.</u>
Hours per Response	64	143 per solicitation 112 per contract <u>255 per successful bid</u>
Responses per year		94,000
Total annual hours	1,391,040	14,494,800
Aug. cost per hour	<u>15.43</u> 20,441,664	<u>50.00 (compensation) *1</u> \$724,740,000

*Based on reported industry averages for various occupations including managerial, engineering, financial, and legal at sr. and jr. levels. PIA member companies reported a high degree of involvement of managerial employees in validation and negotiation.



**Aerospace
Industries
Association**

Don Fuqua
President

January 4, 1989

The Honorable Frank C. Carlucci, III
Secretary of Defense
The Pentagon
Washington, D.C. 20301-1000

Dear Mr. Carlucci:

The Aerospace Industries Association (AIA) Board of Governors, which consists of senior executives from each of the AIA member companies, at its annual meeting in November 1988, agreed that rights in technical data and computer software is among the most serious issues facing the defense industry today.

Rights in technical data and computer software has been a topic of considerable concern for some time and has been actively addressed by the AIA's Procurement and Finance Council and Intellectual Property Committee. However, because of the continuing delay in resolving significant policy matters, the AIA Board of Governors felt that executive level attention focused on working with DoD to evolve an evenhanded regulation on this issue was necessary. As a result, the Board of Governors established an executive Ad Hoc Committee on rights in technical data and computer software to address the industry position in working with DoD. Art Wegner, Senior Vice President, United Technologies Corporation and President, Pratt & Whitney Group agreed to chair this committee.

The DoD Defense Acquisition Regulatory (DAR) Council published the latest revision of an interim regulation on rights in technical data and computer software in October 1988 and is attempting to finalize this regulation (DAR Case 87-303). Because of the continued concern that the regulation still does not provide the balancing of interests which Congress directed in 1984, we believe it would be a mistake to finalize the regulation at this time. Furthermore, since the interim regulation is in effect, it is not necessary to issue a final regulation just to fill a void. Therefore, AIA requests that DoD not finalize this regulation in order to give the Board of Governors' Ad Hoc Committee an opportunity to express its concerns. We urge that DoD establish a joint DoD/Industry Team to develop a more equitable regulation. You will be hearing from Art Wegner directly on this matter.

Mr. Secretary, it is clearly appropriate that DoD and the industry work jointly in resolving our differences on rights in technical data and computer software if we are to continue to assure that advanced technology, including technology developed at private expense, is available to our national defense.

Sincerely,


Don Fuqua

0080K

DM

International Business Machines Corporation

6705 ROCKLEDGE DRIVE
BETHESDA, MARYLAND 20817

December 22, 1988

Defense Acquisition Regulatory Council

Attention: Mr. Charles W. Lloyd
Executive Secretary
DAR Council
ODASD(P)/DARS
C/O OASD (P&L) (MRS)
Room 3D139, The Pentagon
Washington, DC 20301-3062

Subject: DAR Case 87-303

Dear Mr. Lloyd:

Subpart 27.4 of the DOD FAR Supplement is not applicable to computer software acquired under GSA Schedule Contracts. We believe that computer software that is offered under a GSA Schedule Contract, even though not acquired by an order under the GSA Schedule Contract, should be exempt from Subpart 27.4.

We therefore recommend that the interim rule be modified as indicated or the attached page. This change would eliminate the very burdensome marking requirements for our "Commercial Computer Software."

Thank you for your consideration.

Very truly yours,


Bruce E. Leinster
Federal System Contracts Manager

BL/dmh

CONTRACTS/1B

been made as a result of the analysis of public comments.

B. Regulatory Flexibility Act

A revised Regulatory Flexibility Analysis is necessary and is being provided to the Chief Counsel for Advocacy of the U.S. Small Business Administration. Interested parties may obtain a copy of the Analysis by submitting a written request to the individual listed above.

C. Paperwork Reduction Act

This interim rule contains information collection requirements within the meaning of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq. Accordingly, an emergency information collection clearance request has been submitted to OMB pursuant to 5 CFR 1320.18. Public comments concerning that request will be invited by OMB through a subsequent Federal Register notice.

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense to issue this coverage. Section 808 of the National Defense Authorization Act (Pub. L. 100-180) required the Department of Defense to make certain changes to the Defense FAR Supplement Regarding Technical Data. The Department of Defense published coverage in the April 1, 1988, Federal Register. Comments from within the acquisition community as to properly defining the rights of both the Government and contractors in regard to Technical Data have necessitated issuance of another interim rule in this complex and sensitive area.

List of Subjects in 48 CFR Parts 227 and 252

Government procurement.

Charles W. Lloyd

Executive Secretary, Defense Acquisition Regulatory Council.

Therefore, 48 CFR Parts 227 and 252 are amended as follows:

1. The authority citation for 48 CFR Parts 227 and 252 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DoD Directive 5000.35, and DoD FAR Supplement 201.301.

PART 227—PATENTS, DATA, AND COPYRIGHTS

2. Subpart 227.4, is revised to read as follows:

Subpart 227.4—Technical Data, Other Data, Computer Software, and Copyrights

Sec.

- 227.470 Scope.
- 227.471 Definitions.
- 227.472 Acquisition Policy for technical data and rights in technical data.
- 227.472-1 General.
- 227.472-2 Establishing minimum government needs.
- 227.472-3 Rights in technical data.
- 227.473 General procedures.
- 227.473-1 Procedures for establishing rights in technical data.
- 227.473-2 Prohibitions.
- 227.473-3 Marking and identification requirements.
- 227.473-4 Validation of restrictive markings on technical data.
- 227.473-5 Remedies for noncomplying technical data.
- 227.473-6 Subcontractor rights.
- 227.474 [Reserved]
- 227.475 Other procedures.
- 227.475-1 Data requirements.
- 227.475-2 Deferred delivery and deferred ordering.
- 227.475-3 Warranties of technical data.
- 227.475-4 Delivery of technical data to foreign governments.
- 227.475-5 Overseas contracts with foreign sources.
- 227.475-6 [Reserved]
- 227.475-7 [Reserved]
- 227.475-8 Publication for sale.
- 227.476 Special works.
- 227.477 Contracts for acquisition of existing works.
- 227.478 Architect-engineer and construction contracts.
- 227.478-1 General.
- 227.478-2 Acquisition and Use of plans, specifications and drawings.
- 227.478-3 Contracts for Construction supplies and research & development work.
- 227.478-4 [Reserved]
- 227.478-5 Approval of restricted designs.
- 227.479 Small Business Innovative Research Program (SBIR Program).
- 227.480 Copyrights.
- 227.481 Acquisition of rights in computer software.
- 227.481-1 Policy.
- 227.481-2 Procedures.
- 227.482 [Reserved]

Subpart 227.4—Technical Data, Other Data, Computer Software, and Copyrights

227.470 Scope.

This subpart sets forth the Department of Defense policies and procedures relating to the acquisition of technical data and computer software as well as rights in technical data, other data, computer software, and copyrights. This part does not apply to rights in computer software acquired under GSA schedule contracts.

227.471 Definitions.

"Commercial computer software", as used in this subpart, means computer software which is used regularly for other than Government purposes and is sold, licensed, or leased in significant quantities to the general public at established market or catalog prices.

"Computer", as used in this subpart, means a data processing device capable of accepting data, performing prescribed operations on the data, and supplying the results of these operations; for example, a device that operates on discrete data by performing arithmetic and logic processes on the data, or a device that operates on analog data by performing physical processes on the data.

"Computer data base", as used in this subpart, means a collection of data in a form capable of being processed and operated on by a computer.

"Computer program", as used in this subpart, means a series of instructions or statements in a form acceptable to a computer, designed to cause the computer to execute an operation or operations. Computer programs include operating systems, assemblers, compilers, interpreters, data management systems, utility programs, sort-merge programs, and ADPE maintenance/diagnostic programs, as well as applications programs such as payroll, inventory control, and engineering analysis programs. Computer programs may be either machine-dependent or machine-independent, and may be general-purpose in nature or be designed to satisfy the requirements of a particular user.

"Computer software", as used in this subpart, means computer programs and computer data bases.

"Computer software documentation", as used in this subpart, means technical data, including computer listings and printouts, in human-readable form which (a) documents the design or details of computer software, (b) explains the capabilities of the software, or (c) provides operating instructions for using the software to obtain desired results from a computer.

"Data", as used in this subpart, means recorded information, regardless of form or method of the recording.

"Detailed design data", as used in this subpart, means technical data that describes the physical configuration and performance characteristics of an item or component in sufficient detail to ensure that in item or component produced in accordance with the technical data will be essentially

2 OR WHICH IS OFFERED,

International Business Machines Corporation

6705 ROCKLEDGE DRIVE
BETHESDA, MARYLAND 20817

December 22, 1988

Defense Acquisition Regulatory Council

Attention: Mr. Charles W. Lloyd
Executive Secretary
DAR Council
ODASD(P)/DARS
C/O OASD (P&L) (MRS)
Room 3D139, The Pentagon
Washington, DC 20301-3062

Subject: DAR Case 87-303

Dear Mr. Lloyd:

Subpart 27.4 of the DOD FAR Supplement is not applicable to computer software acquired under GSA Schedule Contracts. We believe that computer software that is offered under a GSA Schedule Contract, even though not acquired by an order under the GSA Schedule Contract, should be exempt from Subpart 27.4.

We therefore recommend that the interim rule be modified as indicated on the attached page. This change would eliminate the very burdensome marking requirements for our "Commercial Computer Software."

Thank you for your consideration.

Very truly yours,


Bruce E. Leinster
Federal System Contracts Manager

BL/dmh

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December 14, 1988

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c/o: OASD (P&L) (MRS)
Room 3D139
The Pentagon
Washington, DC 20301

Re: Interim Defense Department Technical
Data Regulations, DAR Case 87-303

Dear Mr. Lloyd:

These comments apply to the above-referenced interim rule, published in the Federal Register on October 28, 1988. Our comments are based in part on a judicial decision issued since the close of the comment period on November 28, 1988; we hope they are still timely.

The interim rule defines "developed exclusively at private expense" to mean that no part of the cost of development was paid for by the government and that the development was "not required for the performance of a government contract or subcontract." DFARS 227.471. IR&D and B&P costs are considered in the rule to be at private expense. All other indirect costs of development, however, are considered to be government funded when development "was required for the performance of a government contract or subcontract." Id.

The phrase "required for the performance of a government contract or subcontract" is further defined in the rule as meaning that the development was "specified in a government contract or subcontract or that the development was accomplished during and was necessary for performance of a government contract or subcontract."

We believe the definition of "required for the performance of," as meaning "accomplished during" and "necessary" for performance of the contract differs substantially from the meaning of that phrase as it currently appears in the IR&D/B&P

Mr. Charles Lloyd
December 14, 1988
Page 2

cost principle, and could introduce substantial uncertainty and ambiguity in the charging of costs to direct versus indirect accounts.

First, the similar language in the IR&D/B&P cost principle is widely interpreted to mean that only technical efforts specifically required by the terms of a contract must be direct charged. Effort not expressed in the contractual documents, absent other evidence of the intent of the contracting parties, may not be considered a contract requirement, and is therefore eligible to be treated as IR&D or B&P. Any attempt to include "implicit" requirements as falling within the meaning of the phrase "required in the performance", as would occur if the definition included effort "necessary" to performance, would result in confusion and ambiguity as to the scope of permissible indirect charges. It would be inherently impossible to quantify all of the effort which might be considered "implicit" in performing a particular contract. The definitions of the interim rule should not be inconsistent with existing regulatory definitions of IR&D and B&P costs.

Second, the proposed definition is inconsistent with the United States Court of Appeals for the Federal Circuit's recent decision in The Boeing Co. v. United States, App. No. 88-1298 (November 30, 1988). The Federal Circuit in Boeing reversed an ASBCA decision which had broadly interpreted CAS 402 to mean that any proposal-related effort "caused or generated by" a contract must be charged directly to the contract, and that no such effort is eligible to be charged indirect, to B&P accounts. The Federal Circuit permitted direct charging of proposal costs incurred pursuant to a "specific requirement" of the contract, and B&P charging for all other proposal costs related to the contract.

Adoption of the definitions contained in the interim rule would appear to result in disallowance (as indirect expenses) of all of the B&P costs upheld by the court in Boeing. All of the costs which the court upheld as being appropriately charged to indirect accounts were "accomplished during" the performance of the contract in question. The concurrency of the B&P effort with performance of a contract has absolutely no bearing on whether the effort is in fact required by the contract.

In addition, the indirect costs upheld in Boeing were also at least arguably "necessary" for performance, but they were neither funded by the contract nor were they expressed in the contractual documents as being contract requirements. Accordingly, the court properly found that the contracting parties did not intend them to be included as contract

LAW OFFICES
MCKENNA, CONNER & CUNEO

Mr. Charles Lloyd
December 14, 1988
Page 3

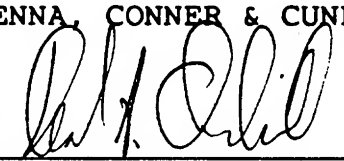
requirements, and they were eligible for charging to indirect cost accounts.

In sum, the definitions contained in the interim rule are inadequate to distinguish between direct and indirect costs, and are therefore also inadequate to determine whether a particular development is government-funded or developed at private expense.

We have been pleased to provide these comments, and we respectfully request that these comments be considered in the issuance of the final rule.

Sincerely yours,

MCKENNA, CONNER & CUNEO

By: 
David A. Churchill



AMERICAN BAR ASSOCIATION

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1987-88

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November 30, 1988

Mr. Charles Lloyd, Executive Secretary
Defense Acquisition Regulatory Council
ODASD (P) DARS
c/o OASD (P&L) (MRS)
Room 3D139
The Pentagon
Washington, D.C. 20301

Re: Interim Defense Department Technical
Data Regulations, 53 Fed. Reg. 43699,
October 28, 1988, DAR Case 87-303

Dear Mr. Lloyd:

This letter is written on behalf of the Section of Public Contract Law of the American Bar Association pursuant to special authority extended by the Association's Board of Governors for comments by the Section on acquisition regulations. The views expressed are those of the Section and have not been considered or adopted by the Association's Board of Governors or its House of Delegates.

On April 1, 1988, the Department of Defense (DoD) issued an Interim Rule and request for comments to revise DFARS Subpart 227.4 to implement section 808 of the National Defense Authorization Act for FY 1988-89, Pub. L. No. 100-180. Following the receipt of public comments on the interim technical data coverage, the DAR Council on October 28, 1988 issued revised interim rules designed to implement the Act.

The comments which follow are limited to considering whether the revised interim regulations comply with the statutory mandate contained in the DoD Authorization Act, and prior authorization measures on this issue, e.g., the Defense Acquisition Improvement Act of 1986, § 953, Pub. L. No. 99-500.

At the outset, however, we endorse several changes made by the DAR Council in the recently issued revised



Mr. Charles Lloyd
November 30, 1988
Page 2

interim rule, i.e., inserting a provision on the protection of technical data pertaining to a privately developed commercial item and deleting the "list or lose" requirement as well as the requirement to submit development cost data. These changes comport with Congressional intent in this area and more accurately reflect DoD policy to obtain minimum essential technical data and data rights. Nevertheless, there are several provisions in the revised coverage that should be changed to implement the requirements in the DoD Authorization Act.

I. Section 227.471: IR&D, B&P and Other Indirect Costs

The Interim Rule recognizes that independent research and development (IR&D) and bid and proposal (B&P) costs are deemed to be "at private expense." However, for all other indirect costs, the rule sets forth the following standard for determining whether indirect costs of development are government funded or at private expense: if the development in question "was required for the performance of a Government contract or subcontract," then such indirect costs are deemed to be government funded. DFARS § 227.471. The Interim Rule now defines the term "required for the performance of a Government contract or subcontract" to mean "that the development was specified in a Government contract or subcontract or that the development was accomplished during and was necessary for performance of a Government contract or subcontract." Id. This definition is inadequate for two reasons.

First, the phrase "required for the performance of a Government contract or subcontract" is similar to the definition of IR&D and B&P costs in FAR 31-205.18. The additional definitional phrase contained in the Interim Rule that "the development was accomplished during and was necessary for the performance" is not contained in the IR&D/B&P cost principle, and is inconsistent with the "required for the performance" definition. The similar language in the IR&D/B&P cost principle is widely interpreted to mean that only technical effort specifically required by the terms of a contract cannot be treated as IR&D. Effort not set forth in the statement of work or specification, absent other evidence of the intent of the contracting parties, is not a contract requirement, and is therefore eligible to be treated as IR&D. Any attempt -- as is arguably the case in this regulation -- to exclude "implicit" requirements in the contractual effort results in confusion and ambiguity as to the scope

Mr. Charles Lloyd
November 30, 1988
Page 3

of permissible IR&D, because of the inherent impossibility of quantifying all of the effort which might be "implicit" in performing a particular contract.

Thus, the definition as currently written could introduce an unwarranted ambiguity into the definition of IR&D costs. We therefore suggest the Interim Rule be rewritten to provide that only that development effort allowed as a direct cost of a contract would be considered Government expense.

Second, the Interim Rule conflicts with Congressional intent on this issue. For example, the legislative history to Section 953 the Defense Acquisition Improvement Act of 1986, Public Law No. 99-500, states that "as a matter of general policy 'at private expense' development was accomplished without direct government payment." It goes on to recognize IR&D expenses and other indirect costs are contractor funds. Accordingly, the Interim Rule as currently drafted fails to treat "other indirect costs" in the manner prescribed by Congress.

II. Section 227.473-2: Prohibitions

The Interim Rule omits, for no apparent reason, a clause contained at section 227.473-2 of the final rule on rights in technical data issued by the DAR Council in 1987. That section addressed procedures by which the government could seek to obtain greater rights in technical data. In language consistent with Congressional intent in this area, the former rule provided at section 227.473-2 that the "refusal to negotiate by a contractor [for greater government rights to technical data] shall not constitute the basis for disqualification for award of a contract or subcontract. . . ." The Interim Rule omits this clause and provides only that a contractor "may not be required, as a condition of being responsive to a solicitation or as a condition for award of the contract or subcontract to sell or otherwise relinquish to the government any rights in technical data beyond those which the Government is entitled" DFARS § 227.473-2(b)(1). By omitting the clause, the Interim Rule arguably suggests the government's ability to acquire such rights can be a pivotal condition for award. Such an interpretation would be contrary to Congressional intent in this area, as set forth in Section 808(a)(3) of the DoD Authorization Act, which provides that contractors may not be required "to refrain from offering to use, or from

Mr. Charles Lloyd
November 30, 1988
Page 4

using, an item or process to which the contractor is entitled to restrict rights in data"

We recommend that the former clause, stating that any refusal by a contractor to negotiate greater government rights in technical data shall not constitute the basis for contract award disqualification and shall not constitute a pivotal condition for award, be reinserted into the regulations.

III. Section 252.227-7037: Validation of Restrictive Markings on Technical Data; Removal of Restrictive Markings Prior to Final Adjudication


If a contractor fails to appeal, file suit, or provide the notice of intent to file suit to the Claims Court within 90 days after a contracting officer's final decision that the contractor's restrictive markings are not justified, the Interim Rule permits the government to cancel the markings prior to a final adjudication of the dispute at issue. DFARS § 242.227-7037(a)(f)(iii). Thus, contractors will receive automatic protection of the disputed data only if they appeal, file suit, or provide a notice of intent to file suit within 90 days of the final decision.

Under the Contract Disputes Act, 41 U.S.C. §§ 601 et seq., however, contractors have one year from the date of the contracting officer's final decision to file suit. Accordingly, the Interim Rule as presently written has the effect of reducing the one-year filing period of the Contract Disputes Act. It is impermissible to shorten the statutorily-authorized time limitations in this manner.

Conclusion

We respectfully request that these comments be considered in the issuance of a final rule, to fully comport with the statutory requirements of the National Defense Authorization Act for FY 1988-89 and prior authorization measures on this issue.

Sincerely,



Thomas J. Madden, Chairman
Section of Public Contract Law

TJM:tjm

apollo
computer inc.

November 29, 1988

Defense Acquisition Regulatory Council
ATTN: Mr. Charles W. Lloyd
Executive Secretary
DAR Council ODASD(P)/DARS
c/o OASD (P&L) (MRS)
Room 3D139
The Pentagon
Washington, DC 20301-3062

Re: DAR Case 87-303

Dear Mr. Lloyd:

Please provide us with a copy of the interim rule which was published last April that amended DoD FAR Supplement coverage of rights in technical data.

Thanks very much.

Sincerely,

Richard L. Bugley

Richard L. Bugley
Associate General Counsel

~~Concise~~ -
They probably
need both.

called 12/6
sent him - Agreed
October Versions
11

President
Kenneth McLennan

Vice President and Treasurer
Thomas F. Russell, Chairman
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MAPI

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November 28, 1988

Mr. Charles W. Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
Room 3D139
The Pentagon
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

Interim Defense Department Regulations Relating to Rights in Technical Data

DAR Case 87-303

We wish to comment on the interim regulations published in the Federal Register of October 28, 1988 (October 28 interim rules) that amend provisions of the Defense Federal Acquisition Regulation Supplement (DFARS) relating to rights in technical data under defense contracts. We understand that the interim regulations replace in their entirety the previous interim rules on this subject that were published for public comment in the Federal Register of April 1, 1988 (April 1 interim rules).

As your records reflect, MAPI submitted written comments to the Defense Acquisition Regulatory Council (DAR Council) pertinent to the April 1 interim rules. To the extent that the October 28 interim rules remain unchanged from the April 1 interim rules--which we believe is substantial in measure--we incorporate and reiterate in this statement our concerns with specific issues addressed in our earlier comments that remain unsatisfactorily resolved through the application of the October 28 interim rules. We stress that these issues continue to be of legitimate and major importance to all companies that do business with the Department of Defense (DOD).

Insofar as further comments to the October 28 interim rules appear warranted, we briefly address the specifics of our additional concerns below.

Overview of the Interim Rules

Preliminary statements to this current regulatory guidance indicate that "major changes" were made to the April 1 interim rules based on an analysis of the 44 public comments received. However, our reading of the October 28 interim rules suggests that few of the changes from the April 1 interim rules are of "major" proportion and that the analysis of the comments received, including MAPI's, was cursory in nature.

MAPI promotes the technological and economic progress of the United States through studies and seminars on changing economic, legal, and regulatory conditions affecting industry.

CODSIA'S MAJOR OBJECTIONS
TO THE
DOD REVISED INTERIM REGULATION ON
TECHNICAL DATA AND COMPUTER SOFTWARE
(OCTOBER 1988)

1. DFARS 227.471 Definitions.

Certain language changes recommended in our letter of September 30, 1988, have been applied entirely out of context by the DAR Council. For example, the DAR Council attributes the deletion of the word "directly" from the definition of "Developed Exclusively with Government Funds" to an industry comment, without incorporating industry's total recommendation.

The present language is subject to multiple interpretations, could lead to unreasonable demands for information from contractors, and will cause an unreasonable increase in the administration and policing of data requirements and rights. Specifically, the language could result in Government demands for rights in technical data for highly proprietary design systems technology or manufacturing systems technology developed at private expense and merely used to design or produce military products or processes. This definition could inappropriately sweep in not only proprietary data and software depicting the item, component or process being acquired but also design systems technology and manufacturing systems technology generally developed by indirect and private expense funds for use over developing companies' entire product line. These types of technical data and computer software should not normally be acquired by the Government, but when acquired should only be acquired with limited rights.

If the changes to definitions recommended in the attachment to our letter of September 30, 1988 are not accepted, we urge that the definitions offered by OMB in their letter of June 29, 1988 to DoD for "Developed Exclusively with Government Funds" and "Developed Exclusively at Private Expense" be adopted. In either event, the definition of "Required for the Performance of a Government Contract or Subcontract", should be deleted.

2. DFARS 252.227-7013 Agreement on Limited Rights Data.

As current policy statements dictate, it is a statutory requirement for both parties to reach negotiated agreements regarding the rights with which technical data will be delivered. The basic 252.227-7013 data rights clause at subparagraph (b)(3)(ii) permits the parties to agree on which data the Government shall obtain with limited rights. The purpose of such an agreement, as we see it, is; a) to avoid later disputes as to whether certain items, components and processes were ever "developed" (as that term is now defined), and b) to enable contracting where there are

insufficient past records to prove that the technical data was developed at private expense. If mutual agreements resolving such issues are to be meaningful and encouraged, then they should not be subject to being set aside pursuant to the contract clause at 252.227-7037 concerning validation proceedings.

Further the phrase "for a specified period of time", should be deleted from 252.227-7013 (b)(3)(ii) as well as in the first paragraph of the "Limited Rights Legend" following (b)(3)(iii). Time limits may be negotiated, but are not statutorily or otherwise required.

3. DFARS 252.227-7013 - Minor Modifications.

Insert the words "including minor modifications thereof" after the words "private expense" in (b)(3)(i) of this clause. This achieves a more equitable balance between the rights of the Government and contractors and brings the regulation in closer conformity with the FAR. Additionally, the reference in this same subparagraph to "(a)(1)" should be a reference to "(b)(1)."

4. Procedures for Identifying Minimum Government Data Needs.

The policy section of 227.472-2(a) has a direct reference to DoD Directive 5010.12 for guidance to Government procurement personnel on identifying minimum Government needs. The current version of this directive was issued in 1968 and it is undergoing revision. Because the extent of Government acquisition is critical to the entire data rights issue and the matter is most complex, we believe that defining minimum Government data needs should be stated in the regulation and not in a DoD directive.

5. Private Expense Data Not Pertaining to Developed Items, Components or Processes.

10 U.S.C. 2320 (a)(2)(B) protects contractor technical data "pertaining to items and processes developed exclusively at private expense", but does not limit protection exclusively to such technical data. Section 2320 (a)(1) recognizes that there are other contractor rights in technical data which are to be protected. Since there is no legal restriction or expressed policy justification for this definition to be so limited, the words "pertaining to items, components or processes" in 227.472-3(b)(1), 252.227-7013 (b)(3)(i) and ALTERNATE II (b)(2)(i) must be deleted.

Alternatively we recommend a new category of technical data subject to limited rights, comparable to 252.227-7013 (b)(1)(ii) for unlimited

rights data, be provided at 252.227-7013(b)(3) for technical data resulting directly from the performance of experimental, developmental or research work which was not specified as an element of performance under a Government contract.

6. DFARS 227.475-2 and 252.227-7027 Deferred Ordering of Technical Data.

The deferred ordering clause should be deleted in its entirety. It is unworkable in conjunction with the notification and listing provisions. If the clause is to be retained, procedures for dealing with the notification and listing requirements need to be clearly set forth and must be consistent with the application of other requirements of the regulation. Preferably the technical data to be delivered should be limited to what is called for in the Contract Data Requirements List.

7. DFARS 227.473-1 Procedures for Establishing Rights in Technical Data.

In paragraph (b)(1) of 227.473-1 the words "unless there are grounds to question the validity of the assertion", should be deleted. The validation procedures of the regulation should be the sole mechanism to resolve questions regarding the justification for assertion of rights in technical data.

8. DFARS 227.473-1(d) and 252.227-7013 (b) Standard Non-disclosure Agreements.

To the extent that a standard non-disclosure agreement is provided for in the regulation, the agreement should be between the recipient of the data and the holder of the rights, and should be consistent with commercial practices, allowing for the statutory exceptions associated with federal contracting.

9. DFARS 227.473-6 and 252.227-7013(i) Subcontractor Rights.

The procedures in the regulation concerning a prime contractor's responsibility for its subcontractors encourages confrontation and potential litigation between prime contractors and their subcontractors, rather than facilitating the negotiation of rights in data. As a minimum, we recommend that the identical sentence at 227.473-6(b) and the clause at 252.227-7013(i)(6) be deleted. The remaining language is sufficient to recognize the important relationship between prime contractors and their subcontractors.

10. DFARS 227.472-3(a)(2) Exception to Unlimited Rights - Government Purpose License Rights.

The time periods for expiration of limited rights which were

authorized as negotiation objectives under 10 USC 2320 (c) provide for subsequent use of technical data only for "U.S. Government purposes", not "unlimited rights" as provided for in 227.472-3(a)(2)(i). Since there is not a statutory prescribed time limit for Government Purpose License Rights, nor a statutory requirement dictating that there always be a time limit on limited rights, the regulation and policy of the revised regulation appears to be unduly confiscatory and must be changed to reflect the flexibility provided by statute.

11. DFARS 227.473-2 Prohibitions.

10 USC 2320(a)(1) provides that the regulation shall not "impair the rights of any contractor with respect to patents or copyrights or any other rights in technical data established by law." This statutory prohibition should be listed under 227.473-2.

12. DFARS 252.227-7018 Restrictive Markings on Technical Data.

The provision in (b)(3) of this clause imposes a costly and burdensome obligation on the contractor to "review" its subcontractors' procedures for controlling the restrictive markings on technical data. Instead of a review, we suggest that it is sufficient for subcontractors to provide a representation to the party to whom they submit their data that they have such procedures.

Additionally, to be consistent with 227.473-1(d)(iii)(5), the words in 252.227-7018 (b)(4) "subject to other than unlimited rights", should be changed to "furnished to the contractor by the Government".

13. DFARS 227.473-3(e) and DFARS 252.227-7013(f)(2) Legend Marking.

Many contractors have commercial restrictive legends preprinted on media used for technical data. A contractor's commercial legend should not be considered an unauthorized marking if the contractor applies the Government-authorized markings and a transition legend, rather than requiring the contractor to delete the commercial legend and then apply the "authorized" legends. These provisions should be amended as follows:

"The commercial restrictive legend of a contractor or subcontractor shall not be considered a non-conforming marking if the following transition legend is also applied to the technical data:

Notwithstanding any other restrictive legend appearing on this technical data, the Government shall have (Unlimited Rights/Limited Rights/Government Purpose License Rights) in technical data pursuant to (Contract No. and Contractor)."

14. DFARS 227.472-3 Rights in Technical Data.

In the definition of unlimited rights, the DAR Council has deleted the statement that data which is not identified in a list in the contract becomes unlimited rights data. However, the policy is still ambiguous, since the last paragraph of 227.472-3(c) still states that the Government shall have unlimited rights in technical data for which the contractor fails to provide notice under 252.277-7013(j). Furthermore, 52.227-7013(k) states that technical data and computer software shall not be tendered with other than unlimited rights, unless it is part of the list. This may again imply that, if data is not part of the list, then it becomes unlimited rights data, contrary to the Government's own statement of intent in the revised regulation. It is our view that notification should be sufficient and the contractor should have without reservation the right to amend the list unilaterally.

15. DFARS 252.227-7037 Validation of Restrictive Markings on Technical Data.

In line with our comments in Item 2 of this Attachment relative to meaningful advance agreements on rights in data, we suggest a change to 252.227-7037 be made. Our recommendation is to add a new paragraph (d)(5) to this clause as follows:

"(5) A restrictive marking shall not be challenged if the Contracting Officer and the contractor or one of its subcontractors have reached an agreement regarding greater rights in technical data granted the contractor or rights granted the Government"

16. Computer Software.

a. The distinction in the policy at 227.471 and in the clause at 252.227-7013 between commercial and non-commercial computer software is neither necessary nor appropriate. The Government has no practical reason to require greater rights in not-yet-widespread software than it needs in software commercially distributed. The confusion that is created with respect to rights in privately developed software by differentiating as above, should be eliminated. The interests of the Government and industry should be balanced by a uniform policy and regulation that permits all privately developed software to be delivered with restricted rights, and computer software developed with Government funds to be delivered with Government Purpose License Rights without any time limitation. This would conform the regulation to the report on the Government/Industry recommendations of the Software Engineering Institute. We also recommend consideration of the views expressed on software licensing in the "Report of Workshop on Military Software", submitted to the Defense Science Board on July 1, 1988.

b. Other recommendations to clarify and improve the treatment of computer software in the revised regulation if a separate regulation is not issued, are reflected below.

- o The definition of computer software should be amended to include source code. This is essential to avoid unconscionable dissemination of source code throughout the Government.
- o The definitions of "developed" and "at private expense" should extend to computer software, as well as hardware-related technical data.
- o In 227.471, computer software should be added to the definitions of "Developed" and "Developed Exclusively at Private Expense". Without this change there would be continuing uncertainty in many areas of the regulation. Consider, for example, 227.481-2(b)(4) and 252.227-7013(b)(3), both referring to computer software developed at private expense.
- o Compare paragraph (d) of the definition of "Restricted Rights" in 227.471 with 227.481-1(a)(1) and (2). Where computer software results directly from development required under a government contract but is merely a modification or derivative of software previously "Developed Exclusively at Private Expense", the Government should not acquire unlimited rights. We recommend adding a subparagraph (6) at the end of 227.481-1(a) as follows:

"(6) If work specified as an element of performance in a Government contract includes or requires modification, enhancement or improvement of computer software previously developed exclusively at private expense, the Government shall acquire only "restricted rights" in the derivative software resulting from such work."

- o In 227.481-1; revise the paragraph as follows:
 - In paragraph (a)(1) delete the phrase "or generated as part of". This change is necessary for consistency with 252.227-7013(c)(2)(i).
 - In paragraph (a)(2) delete the word "generated" and insert "developed in the course of and".
- o In 252.227-7013(c)(2)(ii), revise the subparagraph as follows:

"Computer software required to be developed under a Government contract or subcontract or developed during and a necessary part of performing a Government contract or subcontract."

This change is necessary because computer software is not included in the definition of "Required for the Performance of a Government Contract or Subcontract," in 227.471.

- o At the end of 252.227-7013(e)(1), insert the following:
"as are expressly set forth in a license agreement made part of this contract, as required by subparagraph (c)(1)(i) above."
- o DFARS 252.277-7013(f) Removal of Unjustified and Nonconforming Markings.

Computer software should be subject to the same validation procedures as other types of technical data. This can be accomplished by adding the words "Computer Software" after the words "Technical Data" in the title of (f)(1) and (2), adding the words "and computer software" after "technical data" in the body of (f)(1), and by deleting (f)(3) of the referenced clause.

COGR

an organization of research universities

COUNCIL ON GOVERNMENTAL RELATIONS

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November 28, 1988

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Mr. Charles Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
ODASD(P)/DAR
OASD, P&L (MRS)
The Pentagon, Room 3D139
Washington, D.C. 20301-3062

Reference: DAR Case 87-303

Dear Mr. Lloyd:

The Council on Governmental Relations (COGR) welcomes the opportunity to comment on the revised interim rule that supersedes the interim rule published in the Federal Register, April 1, 1988. This is DFARS Subpart 227.4 - Technical Data, Other Data, Computer Software, and Copyrights.

We appreciate the DAR Council's positive response to comments received on the first interim rule. The revised rule is somewhat improved. We also appreciated the Council's recognition that the eventual final rule will be further improved by soliciting another round of public comment.

Before offering a few specific comments on the revised interim rule, we wish to restate the key elements of COGR's position on this matter. We believe it is in the best interest of the government and the academic community to have a single government-wide policy concerning technical data, software, and copyrights arising in federal agreements with colleges and universities. Further, we believe that such a policy should parallel the government patent policy. It is clear the P.L. 96-517 as amended by P.L. 98-620 has facilitated stronger research relationships and technology transfer linkages between universities and industry. The effective transfer of university technology to the marketplace requires a federal policy for technical data, software and copyrights which parallels that for patentable inventions. Many technologies being pursued on university campuses today are an inseparable combination of inventions, technical data and computer software involving property rights other than patents. Nuclear magnetic resonance imaging devices, artificial intelligence technology and integrated circuits are examples. Technology transfer by universities is impeded unless the same presumption of contractor ownership applies to technical data and to software as to patentable incentives. Only through such

Mr. Llc
November 18, 1988
Page Two

symmetry of federal policies can we achieve the results intended in the April 10, 1987 Executive Order "Facilitating Technology Transfer."

The specific changes/additions proposed by COGR are shown in Attachment A. We would be pleased to furnish more detailed analysis or arrange discussion with representatives of member universities if that would be useful.

Sincerely,



Milton Goldberg

Attachment

ATTACHMENT A

Comments on DAR Case 87-303

1. At 227.475-8 Publication for sale, add the following words in quotes below:

Alternate(OCT 1988) may be used in research contracts when "the contractor is a university or nonprofit organization with an effective transfer program or with other contractors when"...

2. At 227.472-1, create a new (c) as shown below and relabel subsequent paragraphs:

"(c) University interests

Universities' interests are similar to those of commercial and some nonprofit contractors except that universities generally rely on licenses to third party companies to commercialize technologies they develop."

3. At 227.472-3(a)(2)(ii)(B), revise (B) by revising the words as shown below:

"(B) Technical data generally will be published"...

4. At 227.473-1(c), add the new item (iii) shown below and renumber subsequent paragraphs:

"(iii) Whether the contractor is a university with an effective program to license its technology to industry."



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November 28, 1988

Defense Acquisition Regulatory Council
Attn: Mr. Charles W. Lloyd
Executive Secretary, DAR Council
ODASD(P)/DARS
c/o OASD (P&L) (MRS)
Room 3D-139
The Pentagon
Washington, D.C. 20301-3067

Dear Mr. Lloyd:

The following comments are submitted in reference to DAR Case 87-303 by Electronic Data Systems Corporation, a large-scale systems integration firm which provides information hardware, software, and telecommunications systems to Defense agencies, among others.

While the second interim rule on Department of Defense technical data rights policy is an improvement over the April 1, 1988 version, there are still several changes which are necessary to preclude the Defense Department from releasing data produced solely with private funds. These changes are necessary to ensure that this policy conforms to the present Department of Defense position on defense data and technology transfer.

1. DFAR 227.472-3 (a) (iv) continues to jeopardize small businesses by enabling the Government to lawfully confiscate their property for use with unlimited rights, despite the fact that the property in question was developed exclusively at private expense. This clause appears to be in conflict with DFAR 227.480 (b) which would protect copyrighted material from placement in the public domain. This provision will deter small businesses from becoming Government subcontractors if their work product can be legally appropriated by the Government.
2. DFAR 227.472-4 (a) and DFAR 227.475-2 (C) should be changed to reflect that the "Statute of Limitations" on technical data and deferred ordering of technical data and software should be the earliest of delivery of items or the end of the contract. While the present language seems innocuous, with 10- and 12-year contracts being entered

Charles W. Lloyd

-2-

into, it is possible for the Government to delay asserting its rights for as long as 15 years, despite receipt of some deliveries in the early part of the contract.

Thank you for the opportunity to provide these inputs, which we trust will be considered for inclusion in the final regulation.

Sincerely,

Fred Gebler

Fred Gebler
Government Affairs Representative

AFG/cs

Digital Equipment Corporation
10003 Derekwood Lane
Lanham, Maryland 20706

November 28, 1988

digital

Mr. Charles W. Lloyd
Executive Secretary
Defense Acquisition Regulatory Council
ODASD (P)/DARs, Room 3D139
The Pentagon
Washington, D.C. 20301-3062

Ref: DoD Interim Regulation "Part 227 - Patents,
Data, and Copyrights."

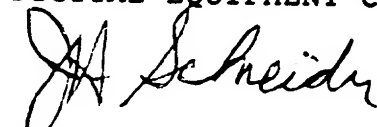
Dear Mr. Lloyd:

Digital Equipment Corporation is pleased to provide comments on the DoD Interim Regulation which deals with the acquisition of technical data and computer software. While we are pleased that this latest draft of the regulation contains improvements over previous drafts, we believe that there is still much work to be done before a clear and unambiguous regulation is issued. In that regard we recommend a joint Government and contractor working group with the responsibility of resolving this issue once and for all. Digital Equipment Corporation is very interested to work on such an effort.

In the meantime, we provide, as an attachment hereto, some preliminary observations dealing with the regulation's treatment of computer software.

We would appreciate the opportunity to meet with you to discuss our specific comments.

Sincerely,
DIGITAL EQUIPMENT CORPORATION



Jeffrey H. Schneider
Counsel
Government Systems Group

JHS:ja
Attachment

cc: Kieran Bustamante

COMMENTS ON DOD INTERIM RULE ON DATA RIGHTS

1. ISSUE: ENCOURAGE COMMERCIALIZATION OF CUSTOM DEVELOPED COMPUTER SOFTWARE

DISCUSSION: The interim rule provides additional procedures and criteria for contractors to obtain exclusive rights in technical data in consideration of Executive Order 12591, entitled "Facilitating Access to Science and Technology." However, the rule fails to provide such procedures and criteria for software except for software developed under the SBIR program. To encourage contractors to expend resources in developing custom software for the DOD, it is essential that contractors be able to exclusively exploit the technology developed under DOD contracts.

Without a means to restrict the use of custom software in the commercial marketplace and prevent the developer's competitors from obtaining access to the proprietary portions of the software, software that is custom developed for the government and conveyed with unlimited rights, cannot be effectively commercialized. Consequently, only the government obtains the benefit of the software.

The current DFARS, including the interim rule, does not readily facilitate commercializing software that is custom developed for the government. The only way to obtain exclusive commercial rights under the current rule is to negotiate a special agreement with the Agency. Such a negotiation would probably require a DFAR deviation, an expensive, time consuming process.

Government Purpose License Rights (GPLR) are currently only applicable to computer software developed under the SBIR program. Applying GPLR to all custom software would encourage and expand commercial utilization of software developed under DOD contracts. GPLR would give the government a royalty free right to use the software for government purposes only, and to permit others to do so, while giving the developer a means and incentive to commercialize the software. Commercialization of software developed for the DOD is consistent with Executive Order No. 12591 and can be facilitated by simply making Government Purpose License Rights available for both SBIR and non-SBIR software.

RECOMMENDATION: Encourage commercialization of software which is custom developed for the government by extending Government Purpose License Rights (GPLR) to both SBIR and non-SBIR software.

2. ISSUE: PROTECTION OF PRIVATELY DEVELOPED COMPUTER SOFTWARE MODIFIED UNDER GOVERNMENT CONTRACT

DISCUSSION: The development of custom or other newly developed software under a government contract is often time consuming and expensive when compared to buying commercial off the shelf software or buying commercial products and modifying them to meet agency needs. Most agencies develop software only when a commercial product with the required functionality is not available. Often, commercial products can be modified to conform to an agency's unique requirements at relatively minor expense, saving the government time and money that would be spent developing new software. It is generally agreed that the government benefits greatly from the readily available support and maintenance associated with privately developed

commercial software.

Unfortunately, under the existing regulations, contractors proposing to modify software developed at private expense during performance of a Government contract risk surrendering to the Government unlimited rights in both the Government funded modifications and the underlying privately developed software itself. This has the effect of deterring offers and sales to the Government.

The interim rule addresses this issue at DFARS 227.481-2(b)(4) which states that where computer software developed at private expense is modified under a Government contract, "only that portion of the resulting product in which the original product is recognizable will be deemed to be computer software developed at private expense to which restricted rights may attach." This language, though helpful, is not dispositive. There is no clear definition of "recognizable" and no guidance as to how much if any of the underlying software can be modified and still be considered "recognizable." The dearth of case law in this area merely underscores the need for more definitive guidance in the DFARS on this issue.

The interests of both industry and Government would be served by implementing a new regulation clearly stating that where privately developed computer software is modified as a necessary part of performing under a Government contract, the data rights of the original, underlying computer software shall not be affected. The data rights of the end (modified) product would then be determined in accordance with the applicable acquisition regulation.

Adopting this clear, unambiguous standard for Government funded modifications to privately developed software would allow the Government to avail itself of the benefits of using commercial computer software. Industry would be provided with an incentive to explore the increased use of commercial computer software in response to Government requirements as an alternative to the expensive and time consuming process of developing custom software. At a minimum, industry would no longer be deterred from proposing the modification of their best and most proprietary computer software under Government contracts.

RECOMMENDATION: Amend current acquisition regulations to ensure absolute protection of privately developed computer software which is to be modified under a Government contract.



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November 28, 1988

Defense Acquisition Regulatory Counsel
c/o OASD (P&L) (MRS)
Room 30139, The Pentagon
Washington, D.C. 20301-3062
Attention: Mr. Charles W. Lloyd
Executive Secretary

Dear Mr. Lloyd:

While there are many problems with the proposed interim regulations on Rights in Technical Data published in the Federal Register on October 28, 1988 over which Government and Industry representatives may disagree, I would like to offer a suggestion which I believe would be acceptable to both sides. As explained below, it is not possible in the proposed interim regulations or in the previous regulations to determine the exact limited rights legend to use. The regulations should clearly point out where the legend starts and where the legend ends. Further the policy and procedure portion of the regulations should point out that the limited rights legend provided in these latest clauses is acceptable for use on technical data which is provided with limited rights under contracts containing any of the earlier clauses.

Refer to page 43711 of the Federal Register and note the word "hereof" marked in yellow in the sixth paragraph beneath the bold faced designation limited rights legend. Using the word hereof could lead one to believe that all six paragraphs are part of the limited rights legend. With the frequent changes to the limited rights legend it is very difficult to tell which legend is to be used. Please give us a break and change the DFARS so we can at least tell with certainty where the legend ends. This can easily be accomplished by adding an indication, as I have marked in red, at the end of the second paragraph specifying-End of Legend. Also the previously discussed word "hereof" should be corrected to read "thereof".

Similar changes should be adopted where appropriate for the Government Purpose License Right legend and the Restricted Rights legends. These proposed changes are fairly simple and they would make it a lot easier to identify and, when appropriate, apply the correct legend.

Howard G. Massung
Howard G. Massung

HGM/jm

(i) Technical data pertaining to items, components, processes or computer software developed exclusively at private expense, except for data in the categories in (a)(1) above;

(ii) Technical data that the parties have agreed will be subject to limited rights for a specified period of time; and

(iii) Technical data listed or described in a license agreement made a part of the contract and subject to conditions other than those described in the definitions of limited rights. Notwithstanding any contrary provision in the license agreement, the Government shall have the rights included in the definition of "limited rights" in paragraph (a)(15) above.

Limited rights will remain in effect so long as the technical data remains unpublished and provided that only the portions of each piece of data subject to limited rights are identified (for example, by circling, underscoring, or a note), and the piece of data is marked with the legend below containing:

(A) The number of the prime contract under which the technical data is to be delivered; and

(B) The name of the Contractor and/or any subcontractor asserting limited rights.

(C) The date the data will be subject to unlimited rights (if applicable).

Limited Rights Legend

Contract No. _____

Contractor: _____

Limited rights shall be effective until (insert certain), thereafter the limited rights will terminate and the Government shall have unlimited rights in the technical data.

The restrictions governing the use and disclosure of technical data marked with this legend are set forth in the definition of "limited rights" in paragraph (a)(15) of the clause at 252.227-7013 of the contract listed above. (END OF LEGEND.)

For technical data which the parties have agreed will be subject to limited rights for a specified time period, insert the agreed upon date. If the limited rights are not subject to an expiration date, so indicate.

For technical data which the parties have agreed will be subject to rights other than those described in the definitions of limited rights or CPLR in paragraph (a)(15) and (a)(14) above, insert the following statement:

"In addition to the minimum rights described in the definition of limited rights in DFARS clause at 252.227-7013, the Government shall have the rights described in the license or agreement made a part of Contract No. _____"

This legend, together with the indications of the portions of this data which are subject to limited rights, shall be included on any reproduction hereof which includes any part of the portions subject to such limitations. This technical data will remain subject to limited rights only so long as it remains "unpublished" as defined in paragraph (a) above.

(c) Rights in Computer Software—(1)

Restricted Rights. (i) The Government shall have restricted rights in computer software, as described in a license agreement

made a part of this contract, which the parties have agreed will be furnished with restricted rights. Notwithstanding any contrary provision in any such license agreement, the Government shall have the rights included in the definition of "restricted rights" in paragraph (a)(17) above. Unless the computer software is marked by the Contractor with the following legend:

Restricted Rights Legend

Use, duplication or disclosure is subject to restrictions stated in Contract No. _____ with (Name of Contractor) and the related computer software documentation includes a prominent statement of the restrictions applicable to the computer software, the Government shall have unlimited rights in the software. The Contractor may not place any legend on computer software restricting the Government's rights in such software unless the restrictions are set forth in a license agreement made a part of this contract prior to the delivery date of the software. Failure of the Contractor to apply a restricted rights legend to the computer software shall relieve the Government of liability with respect to the unmarked software.

(ii) Notwithstanding subparagraph (c)(1)(i) above, commercial computer software and related documentation developed at private expense and not in the public domain may be marked with the following Legend:

Restricted Rights Legend

Use, duplication, or disclosure by the Government is subject to restrictions as set forth in subparagraph (c)(1)(ii) of the Rights in Technical Data and Computer Software clause at DFARS 252.227-7013.

(Name of Contractor and Address)

When acquired by the Government, commercial computer software and related documentation so legended shall be subject to the following:

(A) Title to and ownership of the software and documentation shall remain with the Contractor.

(B) User of the software and documentation shall be limited to the facility for which it is acquired.

(C) The Government shall not provide or otherwise make available the software or documentation, or any portion thereof, in any form, to any third party without the prior written approval of the Contractor. Third parties do not include prime contractors, subcontractors and agents of the Government who have the Government's permission to use the licensed software and documentation at the facility, and who have agreed to use the licensed software and documentation only in accordance with these restrictions. This provision does not limit the right of the Government to use software, documentation, or information therein, which the Government has or may obtain without restrictions.

(D) The Government shall have the right to use the computer software and documentation with the computer for which it is acquired at any other facility to which that computer may be transferred; to use the computer software and documentation with a backup computer when the primary computer

is inoperative; to copy computer programs for safekeeping (archives) or backup purposes; and to modify the software and documentation or combine it with other software, *Provided*, that the unmodified portions shall remain subject to these restrictions.

(2) **Unlimited Rights.** The Government shall have unlimited rights in:

(i) Computer software resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any other Government contract or subcontract;

(ii) Computer software required to be originated or developed under a Government contract, or generated as a necessary part of performing a contract;

(iii) Computer data bases, prepared under a Government contract, consisting of information supplied by the Government, information in which the Government has unlimited rights, or information which is in the public domain;

(iv) Computer software prepared or required to be delivered under this or any other Government contract or subcontract and constituting corrections or changes to Government-furnished computer software; and

(v) Computer software which is otherwise publicly available, or has been, or is normally released, or disclosed by the Contractor or subcontractor without restriction on further release or disclosure.

(d) Technical Data and Computer Software Previously Provided Without Restriction.

Contractor shall assert no restrictions on the Government's rights to use or disclose any data or computer software which the Contractor has previously delivered to the Government without restriction. The limited or restricted rights provided for by this clause shall not impair the right of the Government to use similar or identical data or computer software acquired from other sources.

(e) **Copyrights.** (1) In addition to the rights granted under the provisions of paragraphs (b) and (c) above, the Contractor hereby grants to the Government a nonexclusive, paid-up license throughout the world, of the scope set forth below, under any copyright owned by the Contractor, in any work of authorship prepared for or acquired by the Government under this contract, to reproduce the work in copies or phonorecords, to distribute copies or phonorecords to the public, to perform or display the work publicly, and to prepare derivative works thereof, and to have others do so for Government purposes. With respect to technical data and computer software in which the Government has unlimited rights, the license shall be of the same scope as the rights set forth in the definition of "unlimited rights" in (a)(19) above. With respect to technical data in which the Government has limited rights, the scope of the license is limited to the rights set forth in the definition of "limited rights". With respect to computer software which the parties have agreed will be furnished with restricted rights, the scope of the license is limited to such rights.

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Ronald W. Hodges
General Manager
Military Programs

November 23, 1988

DEFENSE ACQUISITION REGULATORY COUNCIL
Attn: Mr. Charles W. Lloyd, Executive Secretary
DAR Council
ODASD (P)/DARS
c/o OASD (P&L) (MRS)
Room 3D139
The Pentagon
Washington, DC 20301-3062

Dear Mr. Lloyd:

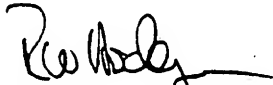
**SUBJECT: DAR CASE 87-303, INTERIM RULE ON RIGHTS IN
TECHNICAL DATA**

As we indicated in our letter of May 24, 1988 which commented on the April 1988 Interim Rule, we develop our products at our expense to protect our market. We are a member of the Proprietary Industries Association and endorse the Association's comments dated November 23, 1988 on this issue.

We are not yet convinced the data rights regulations properly or adequately recognize and protect a Contractor's proprietary property rights in data.

We appreciate the opportunity to comment on this most important subject.

Sincerely,



Ronald W. Hodges

ph 88-124

cc: Proprietary Industries Association
220 North Glendale Ave, Suite 42-43
Glendale, CA 91206

HARVARD UNIVERSITY
OFFICE FOR SPONSORED RESEARCH



HOLYOKE CENTER, FOURTH FLOOR
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CAMBRIDGE, MASSACHUSETTS 02138

November 23, 1988

Mr. Charles W. Lloyd
Executive Secretary
ODASD(P)DARS
c/o OASD(PL)(MRS)
Room 3D139, The Pentagon
Washington, DC 20301-3062

Re: DAR Case 87-303

Dear Mr. Lloyd:

I write to provide Harvard University's comments on the interim rule published at 53FR43698 regarding Patents, Data and Copyrights.

In general, we find the rule to be a reasoned attempt to formulate a regulatory approach to technology transfer under DOD contracts.

However, we would like to make several suggestions for revisions which recognize the unique concerns of educational institutions. As you know, a significant portion of the basic research funded by the Department of Defense is performed by educational institutions and these institutions can (and should) play a major role in the dissemination of the results of federally funded research.

Our suggestions are as follows:

* Under 227.472-1(b) - Add the following sentence:

"Universities and other nonprofit organizations, on the other hand, play an important role in disseminating the results of fundamental research to the industrial sector and government policy should not inhibit that transfer."

* Under 227.472-1(c)(2) - Add the underlined phrase so that the second sentence reads as follows:

"When the Government pays for research and development, it has an obligation to foster technological progress through wide dissemination of the information by the Government or through technology transfer programs conducted by the contractor and, where practicable, to provide competitive opportunities for other interested parties."

* Minimum government needs. Under 227.472-2(a), add the following:

"Where the technical data or computer software results from research and development contracts and does not pertain to items, components or processes to be competitively acquired or needed for repair, overhaul or replacement, DOD will encourage dissemination and commercialization by the contractor."

* Technical data. In the clause at 252.227-7013 under (b)(1), Unlimited Rights, (and in the text at 227.472-3(a)(1)), revise (i) and (ii) to add the underlined language:

"(i) Technical data pertaining to an item, component, or processes which has been or will be developed exclusively with Government funds provided the contracting officer has identified a specific need for the data and that need cannot be met through other means."

"(ii) Technical data resulting directly from performance of experimental, developmental, or research work where delivery of such data was specified as an element of performance under a Government contract or subcontract."

* Computer software. In the clause at 252.227-7013, under (c)(2), Unlimited Rights, revise (i) and (ii) by adding the underlined language:

"(i) Computer software resulting directly from performance of experimental, developmental, or research work where delivery of such software was specified as an element of performance in this or any other Government contract or subcontract."

"(ii) Computer software required to be originated or developed under a Government contract, or generated as a necessary part of performing a contract, where delivery of such software is specified as an element of performance."

* We recommend that 227.472-3(a)(2)(ii)(B) be omitted and a new section added:

"(iii) When the government does not require immediate use of the data for competition and the contractor is a university or other nonprofit organization which has an interest in commercializing the data, the contracting officer will accept Government Purpose License Rights, which will expire after a specified period of time."

We agree that some revisions to the earlier rules that are incorporated into the current regulations exhibit a better effort toward balancing the interests of the government and the contractor in this area of rights in technical data. However, in our opinion the revisions, read within the context of the entire set of rules, generally represent an inadequate, significantly deficient effort to cure the fundamental and specific problems associated with the April 1 interim rules, which we noted in our earlier statement.

We are specifically concerned that the regulations continue to illustrate an unwillingness by DOD to ascribe to a full adherence to and implementation of congressional policy in this area. That is, a policy that encourages innovative technology and permits contractors to retain, not release, their rights in technical data; a policy which dictates that the government obtain only those rights in technical data that are necessary to meet the government's minimum needs. In this regard, the interim rules remain fatally flawed.

Balance of Government and Contractor
Interests Remains Tipped

As suggested earlier, we find that there have been no dramatic changes from the posture of the April 1 interim rules in the October 28 interim rules to demonstrate a more conscious balancing of interests between DOD and the contractor. Although we commented extensively on this issue in our previous statement, we can find no significant improvement in this latest rule revision sufficient to allay genuine fears of contractors that their legitimate proprietary interests in technical data are not being effectively and adequately protected. The government's acquisition of limited rights in proprietary technical data through a negotiated license agreement, together with subsequent execution of nondisclosure agreements by other contractors (who are also commercial competitors), may be an adequate mode of protection for the restricted exchange of proprietary data in some instances, but certainly not in all instances. Other methods to achieve an acceptable exchange of needed proprietary technical data should be incorporated into this regulatory coverage. While there is some oblique reference to other methods, the guidance provided is at best marginal.

Furthermore, there is some indication that the already skewed nature of the current regulatory scenario for protection of contractor proprietary technical data has been made worse due to a newly written provision in the October 28 interim rules. Subpart 227.473-6, "Subcontractor rights," places, in a perfunctory manner, the entire burden of protecting subcontractor rights in proprietary data upon prime contractors. Following this proclamation, the provision concludes with an equally extraordinary contractor-imposed waiver: "(b) The prime contractor may not use its obligation to recognize and protect subcontractor rights in technical data as an excuse for failing to satisfy its contractual obligations to the Government." The intent apparently is to place total responsibility and risk upon prime contractors for protection of subcontractor rights in proprietary data.

This entire provision, Subpart 227.473-6, especially in light of its concluding statement, ignores legal and actual business realities. If, for example, the government insists upon certain data rights within the ownership and control of a subcontractor and the prime contractor is not able to elicit

unlimited or limited rights to certain technical data from its subcontractor for reasons beyond the prime's control, the prime contractor apparently is without contractual or regulatory recourse in its dealings with the government by operation of this provision. Further, the prime contractor may be subject to extraordinary penalties for a circumstance for which the prime is not actually responsible.

We specifically recommend that Subpart 227.473-6 be reviewed and revised in its entirety with a focus toward a more balanced approach with respect to the interests and responsibilities of the government and the contractor. In particular, we recommend that subsection (b), quoted above, be deleted altogether.

What Has Been Determined With Respect
to the Proposed Alternative Approach
To Use of GPLR and Nondisclosure Agreements
in Solicitation Provisions?

Concurrent with the publication of the April 1 interim rules, the DAR Council solicited public comments with respect to a proposed alternative approach to the use of nondisclosure agreements where data subject to Government Purpose License Rights (GPLR) are involved. In brief, it was our understanding that the proposal contemplated, through a solicitation provision, notifying prospective offerors that data subject to GPLR is included and that offerors would receive this technical data for purposes of preparing their individual offers subject to restrictions on further use or disclosure and subject to a requirement to safeguard the data.

For reasons articulated in our earlier statement responding to the April 1 regulations and which we will not repeat here, we strongly recommended that the GPLR-to-prospective-offerors proposal, as stated in the April 1 rules, be withdrawn.

Our reading of the October 28 interim rules indicates a lack of any overt determination by the DAR Council with respect to the previously proposed alternative approach to extend the use of GPLR during the contract solicitation stage, as contemplated. There is a disturbing implication from the vaguely worded and new revisions to Section 227.473-1(a)(2) that the proposal may have been adopted and perhaps incorporated into other provisions of the current rules that are even more ambiguous. Other than by this tenuous inference, it is completely unclear as to what conclusion was reached by the DAR Council.

We recommend that a statement of determination on this issue, together with appropriate textual references, where necessary, be included in the preamble to the final rules. To the extent that no determination has been made, we renew our recommendation that the proposal under consideration on this matter at the time of issuance of the April 1 interim rules be withdrawn.

Provision Relating to Non-Standard
License Rights and Direct Licensing
Is Ambiguous and Needs Clarification

Subsection 227.473-1(c)(4), revised from the April 1 interim rules, apparently represents an effort to differentiate between types of license

rights between the government, the contractor, and third parties and the extent to which each type is subject to negotiation by the government. There is a specific reference to direct licensing, the meaning or application of which is unclear.

A basic question is raised by the precise wording of this provision and the fact that it lacks a practical, common sense meaning. For this reason alone, clarification in the language used is needed.

Viewed from another, more disturbing perspective, this provision appears to be a veiled, unsatisfactory effort to accommodate a clear congressional mandate that DOD shall permit the use of direct licensing between contractors and third parties as a recognized and acceptable alternative to the negotiation and exchange of limited rights in proprietary technical data to the government to develop alternative sources of supply and manufacture. While the April 1 interim rules were totally silent on the availability of direct licensing, this current provision, in its ambiguous reference to direct licensing, is no better at meeting the statutory dictates. Aside from the confused and confusing wording, the provision fails to implement clear congressional intent on this issue.

In our earlier statement, we commented extensively on the essential need for DOD to recognize the value of direct licensing, as Congress has done, and specifically recognize this as an alternative method in the transfer of proprietary data rights to meet the government's needs. We incorporate those same comments and recommendations here. At the very least, we again recommend that this provision be carefully reviewed and clarified.

Conclusion

In our previous statement concerning the April 1 interim rules, we acknowledged the possibility and even probability that very limited congressionally mandated time constraints had imposed a virtually unworkable burden upon DOD to issue its first set of implementing interim rules 120 days following the enactment of the detailed statutory guidance in this area. Even so, we were concerned that the earlier regulations reflected many inconsistencies, both internally in context and externally in terms of policy.

The October 28 "revised" interim rules have not effected a lessening of those same concerns addressed in our earlier statement. Indeed, they are heightened. To be sure, elimination or relaxation of a few of the previously imposed contractor requirements included in the April 1 interim rules (for example, deletion of "list or lose" and certification requirements) represents a step in the proper policy direction. However, we note with disappointment that more significant revisions, necessitated for reasons outlined in our earlier statement and here, were not made.

There is an expectation, fostered in part by statements made during a September 28 DAR Council briefing to industry, that these interim regulations probably will become final rules with little or no further modification. This expectation gains further support through recent comments from certain officials within government that while the October 28 interim rules may not arguably be perfect, DOD and industry "can work it [the imperfections] out" to each other's satisfaction when the rules are applied. Unfortunately, this latter view seems naive and unrealistic. In our opinion, the revised rules

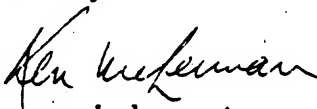
continue to reflect the same fundamental flaws as the April 1 interim rules by affording no real protection to contractors who wish to retain ownership and control over their legitimate proprietary rights in technical data.

The passage of time and submission of analytical comments from the public since issuance of the April 1 interim rules have yielded no discernible progress in DOD's regulatory implementation of the congressional will and policy in this area. Further modification to the rules is of course entirely within the DOD's purview. We fervently renew our earlier recommendations that the interim rules be reviewed completely with substantial revisions incorporated to reflect a significant, and not token, commitment to the stated congressional policy in this area--that is, a more balanced approach toward protecting the interests of the government and contractor, alike.

* * *

This concludes our comments on the October 28 interim technical data regulations. If we can be of further assistance, please let us know.

Cordially,


P r e s i d e n t

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September 29, 1988

Mr. Duncan Holaday
Director
Defense Acquisition Regulatory Council
1211 Fern Street
Arlington, Virginia

Dear Duncan:

On behalf of PIA, I thank you for inviting our comments on what we believe may be the most troublesome aspects of the tech data regulations in their revised form.

As I'm sure you know, in the absence of specific language, it is impossible for us to assure you that the following is a priority list, or that the suggested solutions will accomplish their intent.

Our concerns include the definitions which do not, in our opinion, reflect the Packard Commission recommendations, and other clarifications which were discussed on Monday, September 26th.

- 1) "Developed Exclusively with Government Funds" - To suggest that industry proposed deleting "directly" is misleading. PIA's comments recommended that the government specify and pay for development in which it claims unlimited rights.

The significant recommendation was the change to "and" from "or" between the two tests for government funding. As the definition is now the government need only prove that development was accomplished under and necessary to perform a Government contract or subcontract to claim unlimited rights. No government funds need to be contributed to development.

A minimal short-term solution would be to reinsert the word "directly".

- 2) In contrast to the definition above, "Developed Exclusively at Private Expense" - requires a contractor or subcontractor to

prove total funding and that development was not accomplished under and not necessary to perform a government contract or subcontract.

All three of these tests must be met in order for a contractor or subcontractor to support a limited rights legend.

In the past, subcontractors often relied on the fact that they agreed to firm fixed price purchase orders for production hardware, and that they privately funded development up front as proof of private expense development. Background technology is now subject to the test of "accomplished under and necessary to perform a government contract or subcontract. It will be difficult (unfairly so) for a contractor or subcontractor to justify a claim of prior private expense development under the new definition.

The Packard Commission recommendations (pg. XXVI - Final Report to the President June 1986) does not address the definitions per se but does say, with respect to products developed with private funds, that "the government should acquire only the data necessary for installation, operation, and maintenance".

The accompanying Appendix I, written by the Logistics Management Institute, recommends that:

"At private expense means that the funding for the development work has not been reimbursed by the government, nor ^{was} such work required as an element of performance under a research or development government contract or subcontract." (pg. 140)

The accompanying footnote reads:

"Certain other expenditures reimbursed as indirect costs should also be included within the meaning of 'private expense' but determining which costs these are will require further analysis." (pg. 151)

What is clear is that the Packard Commission appropriately confined the definition to R&D contracts. There is no evidence that they contemplated "accomplished under and necessary to perform ..." as a definition of "required as an element of performance or a definition of "developed exclusively with government funds". I might also add Len Rawicz and Mark Flannigan, the authors of the LMI report verified this interpretation in a discussion earlier today.

3) The definition of "Required as an element of performance under a government contract or subcontract" when used as the primary test for determining the source of funding presents a fundamental problem. The formula shifts all of the risk associated with development not directly charged to the contract (other than independent, research and development and bid and proposal costs) under any contract or subcontract (research and development or production) to the contractor or subcontractor. It cannot help but discourage development performed outside of a statement of work if the government can later use the associated technical data for reprocurement.

4) As was discussed Monday, the "bilateral modification" of the contract list at 473-1(c)(1)(ii) is difficult to reconcile with 10 USC 2320(a)(2)(F)(ii). If the contracting officer can refuse to "modify" the contract list, then the subcontractor with deliverable limited rights technical data is in limbo.

Even with elimination of the explicit "list or lose" provision at 227.472-1 (K), the status of a subcontractor's deliverable limited rights in technical data is unclear absent validation. If a subcontractor insists on contracting officer approval prior to accepting a contract (as the knowledgeable subs will) then a refusal to modify the contract list becomes a form of exclusion which 10 USC 2320 (a)(2)(F) precludes. Striking "bilateral" in both places in this provision will eliminate this problem.

Since Section 806 of HR 4264 will become law prior to the effective date of these regulations you may want to consider its impact on this provision as well as the rest of the regulation. You mentioned Monday that the inclusion post award in the contract list of a product accompanied by limited rights may require a reduction in the prime's price. Section 806 precludes evaluation of a prime contractor's offer to give up unlimited rights in products developed at private expense until the product is identified. Therefore "consideration" would not be necessary.

5) 52.227-7013 (1) should be clarified by adding the following after the 1st sentence. "This provision does not apply to negotiations to acquire greater than limited rights in technical data pertaining to items components and processes developed exclusively at private expense."

This clarification simply assures that implementation will not violate 10USC 2320 (a)(2)(F).

6) The importance of a negotiated agreement of rights in technical data being able to withstand validation was discussed Monday. In order to be able to reach such agreements, assurances that they are valid is necessary.

Bonnie Holiday

This can be achieved by adding the sentence to the
252.227-7037 recommended in the CODSIA letter to you.

With respect to the other changes, or absence of change, discussed
on Monday, it's just too soon to comment.

Sincerely,

Bettie McCarthy
Bettie S. McCarthy

cc: *Doug Longyear*

~~sold on the commercial market~~, nor must the item, component or process be actually reduced to practice within the meaning of Title 35 of the United States Code.

"Developed Exclusively with Government Funds", as used in this subpart, means, in connection with an item, component, process, that the [direct] cost of development was ~~directly~~ paid for in whole by the Government [and] ~~or that the development was required~~ [specified] as an element of performance under a Government contract or subcontract.

"Developed Exclusively at Private Expense", as used in this subpart, means, in connection with an item, component, or process, that no part of the [direct] cost of development was paid for by the Government[.] ~~and that the development was not required as an element of performance under a Government contract or subcontract.~~ Independent research and development and bid and proposal costs, as defined in FAR 31.205-18 (whether or not included in a formal independent research and development program), are considered to be at private expense. ~~Indirect costs are considered funded at private expense. All indirect costs of development are considered Government funded when development was required as an element of performance in a Government contract or subcontract. Indirect costs are considered funded at private expense when development was not required as an element of performance under a Government~~

~~contract or subcontract.~~ [When, in applying these criteria, the entire item, component or process doesn't qualify as "Developed Exclusively at Private Expense", then separate elements thereof which do meet the criteria shall be deemed to qualify; such a separate element can be an existing conceptual design which is focal to the workability of the item, component or process.]

"Form, fit, and function data", as used in this subpart, means technical data that describes the required overall physical, functional, and performance characteristics, (along with the qualification requirements, if applicable) of an item, component, or process to the extent necessary to permit identification of physically and functionally interchangeable items.

"Government purpose license rights", (GPLR), as used in this subpart, means [the Government may] ~~rights to use,~~ duplicate, or disclose data [to a licensee according to the terms of its license] (and in the SBIR Program, computer software), in whole or in part and in any manner, for Government purposes only, and to have or permit ~~others~~ [the licensee] to [utilize such data] ~~do so~~ for Government purposes only. Government purposes include competitive procurement, but do not include the right to have or permit [licensees] ~~others~~ to use technical data (and in the SBIR Program, computer software) for commercial purposes.

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS (CODSIA)

1722 Eye Street, N.W., Suite 300
WASHINGTON, D.C. 20006

(202) 457-8713

September 30, 1988

DAR Case 87-303

CODSIA Case 3-85

← FILE

Mr. Duncan A. Holaday
Chairman, Defense Acquisition
Regulatory Council
ODAD (P)/DARS
Pentagon Room 3D139
Washington, D.C. 20301-3062

Dear Mr. Holaday:

The Council of Defense and Space Industry Associations (CODSIA) appreciates the briefing you provided to its representatives on September 26, 1988 concerning the DAR Council development of the final rule on Rights in Technical Data. The briefing evidenced consideration of the CODSIA letter of June 2, 1988 to the DAR Council providing comments on the interim rule issued April 1, 1988, and that is appreciated as well.

While the disposition of a number of industry objections to the interim rule appear to be equitably resolved, we remain concerned that the DAR Council has not yet sufficiently addressed all of the data rights issues from the Congressionally-mandated perspective of balancing the interests of both the government and contractors. Predicated on the briefing and discussion, it appears that the final rule will fall short of incorporating the statutory direction and the policy provided in the President's Executive Order 12591, "Facilitating Access to Science and Technology."

Since the text of the final rule was not provided to us at the briefing, it is not possible to comment in detail on whether all our principal objections have been considered or whether the changes addressed at the briefing are appropriately worded in the text of the final rule. As a result, we have a major concern that a number of data rights issues that we have previously raised have not been appropriately resolved. In addition, the briefing has surfaced new issues that need to be resolved before a final rule is adopted. We have outlined both of these in the CODSIA objections attached.

Since there appears to be agreement between the Department and industry that the April 1, 1988 interim rule is significantly flawed, we recommend that a second interim rule be issued that would supplant the initial interim rule, yet provide an opportunity for further public comment on this complicated, but significant matter. Additionally, we recommend that the DAR Council provide explicit authority to contracting officers to substitute this second interim rule for the April 1, 1988 rule in any ongoing procurement negotiation that has not been consummated, until a final rule has been adopted.

Sincerely,

A handwritten signature in dark ink, appearing to read "W.C. Rideout". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

W.C. Rideout
Chairman
CODSIA Task Group on
Technical Data

Attachment

CODSIA OBJECTIONS
TO THE
DoD PROPOSED FINAL RULE ON
TECHNICAL DATA REGULATIONS
(Briefing of September 26, 1988)

1. DFARS 227.471 Definitions.

We are concerned that our recommended changes may have been taken out of context by the DAR Council in developing the final rule. For example, the DAR Council attributes the deletion of the word "directly" from the definition of "Developed Exclusively with Government Funds" to an industry comment, without incorporating the total recommended change.

a. The line-in, line-out comments of the Proprietary Industries Association recommended the following definition of "Developed Exclusively with Government Funds".

"As used in this subpart, means, in connection with an item, component or process, that the direct cost of development was ~~directly~~ paid for in whole by the government and ~~or that~~ development was specified ~~required~~ as an element of performance under a Government contract or subcontract."

Simply eliminating the word "directly" from the definition as proposed by the DAR Council, does not comport with substance of the full change proposed by PIA, and endorsed by CODSIA. If the original proposal cannot be adopted, it is recommended that the word "directly" be reinserted in the definition.

b. The phrase "to be accomplished during and necessary to perform" does not fully address the concerns of industry that have been expressed previously. Therefore, the change proposed does not fairly meet industry's proposal to fix this matter. This can be solved by three changes. In line five of the definition of "Developed Exclusively with Government Funds", change the word "required" to "specified". In addition, in the definition of "Required as an Element of Performance Under a Government Contract or Subcontract", change the title from "Required" to "Specified" and delete the phrase, "or that the development was necessary for performance of a Government contract or subcontract."

Your proposed language will be subject to multiple interpretations, lead to unreasonable demands and cause an unreasonable increase in administration and policing of data requirements and rights. Specifically, it could result in government demands for rights in technical data for highly proprietary design or manufacturing systems technology for items and processes developed at private expense that have been merely adapted to produce military products or processes. Furthermore, this definition could sweep in commercial data utilized in the performance of a contract.

2. DFARS 252.227-7013 Rights in Technical Data and Computer Software
- Limited Rights.

The rule must be revised to clarify the binding effect and enforceability of contractually negotiated agreements regarding rights in technical data. As current policy statements dictate, it is a statutory requirement for both parties to reach negotiated agreements regarding the rights with which technical data will be delivered. The basic 252.227-7013 data rights clause at paragraph (b)(3)(i) permits the parties to agree on which data the Government shall obtain limited rights. Issues may exist regarding whether certain items, components and processes were ever developed (as that term is now defined). If preaward mutual agreements resolving such issues are to be meaningful and encouraged, then they should not be subject to being set aside pursuant to the contract clause 252.227-7037 concerning validation proceedings.

Our recommendation is to add a new paragraph (d)(5) to the clause at 252.227-7037 (Validation of Restrictive Markings on Technical Data):

"(5) No right to challenge a restrictive marking shall exist with respect to technical data for which an agreement, such as that contemplated by DFARS 252.227-7013 (b)(3)(ii), has been reached between a DOD Contracting Officer and the Contractor or subcontractor regarding the rights with which such technical data was to be delivered to the Government unless the Government can show such agreement to have been based on fraud or misrepresentations of the Contractor or subcontractor."

3. DFARS 252.227-7013 Postaward Negotiation - Disputes.

To assure that the provision in the contract clause 252.227-7013(1) does not violate 10 U.S.C. 2320(a)(2)(F), we suggest the following sentence be inserted as the second sentence:

"This provision does not apply to negotiations to acquire greater than limited rights in technical data pertaining to items, components and processes developed exclusively at private expense."

4. Procedures for Identifying Minimum Government Data Needs.

At the briefing you advised us that the final rule will provide a direct reference to DoD Directive 5010.12 in the policy statement for guidance to Government procurement personnel on identifying minimum Government needs. The current version of this directive was issued in 1968 and it is undergoing revision. We believe that defining minimum government data needs should be in the regulation and not a DoD Directive. Such directives are usually issued without subjecting them to the rulemaking safeguards such as public comment. We suggest the following definition be included in the regulation, in lieu of the reference to the DoD Directive::

"The minimum Government need is that data required to install, use, maintain and operate items purchased, and training for such purposes. Additional desires for competitive procurement purposes which might involve obtaining rights within the prohibitions of 227-473.2 may not be minimum needs."



United Technologies Building
Hartford, Connecticut 06101
203/728-7613

Frank W. McAbee, Jr.
Vice President
Government Contracts
and Compliance

August 26, 1988

The Honorable Robert B. Costello
Under Secretary of Defense
for Acquisition
The Pentagon, Room 3E933
Washington, D.C. 20301-8000

Dear Secretary Costello:

We understand that DoD will shortly issue final regulations on rights on technical data. We communicated our concerns during the comment period but understand that few changes are expected in the final regulation. If the interim regulation is adopted as final, contractors, for the first time, will be denied a fair opportunity to protect privately developed technology.

In two respects, DoD's interim data regulation departs dramatically from past coverage. First, the Government would take unlimited rights in any data not included in an advance listing in the contract. DFAR 52.227-7013(b)(ix) and (k). The process of design and development, by its nature, however, does not permit any comprehensive and static listing of technology to be used. Flowing the advance listing requirement from the primes to subcontractors, who may change through the course of contract performance, compounds the difficulty. In addition, the "list or lose" approach of the interim regulation is contrary to the statutory system for substantiating proprietary claims.

Second, the Government would take unlimited rights in data funded indirectly when development either was specified or was necessary for performance. DFAR 52.227-7013(a)(11), (a)(12), (a)(16), and (b)(1)(ii). Although understandable in connection with work specified, the approach of the interim regulation becomes unworkable with the addition of the ambiguous phrase "necessary for performance." This phrase will foster uncertainty and legal disputes, as it has in other contexts. Within the context of the interim regulation, this phrase indicates that requirements need not be explicit but may be implied. For example, the mere fact of proper allocation (FAR 31.201-4(c)) of costs associated with manufacturing technology, an activity inherent to the performance of a manufacturer, could be argued persuasively as necessary for performance and result in "unlimited rights" data. Other than contracts specifically for the development of manufacturing technology, however, prior regulations have not considered such efforts to be developmental work required by the contract. Historically, contractors have considered manufacturing technology to be proprietary.

Secretary Costello
August 26, 1988
Page 2

Other troubling aspects of the interim regulation have been addressed in detail by industry associations. The two provisions discussed above are unique in that careful contracting and management systems offer no protection. These two provisions would inescapably result in the forfeiture of proprietary interests. In this respect we hope that the regulation will return to the former coverage, calling for a contractor's pre-notification of proprietary interests and Government rights in data purchased explicitly, not by implication. Attached are the relatively modest changes to accomplish these objectives. We were hesitant to communicate these concerns at this time but concluded that the best opportunity for changes existed prior to issuance of the final rule. Thank you for your consideration.

Sincerely,



Frank W. McAbee

/mat

cc: Jack Katzen
 - Eleanor R. Spector

Modifications to DFAR 52.227-7013

1. In subparagraph (a)(16) delete the end of the sentence, "or subcontract or that the development was necessary for performance of a Government contract or subcontract."
2. Delete subparagraph (c)(2)(ii).
3. In subparagraph (k), add, "This subparagraph (k) applies only to detail design data and applies only with respect to line items for production and not development."

MOOG

Ref. PDC-109-88 / CORR (1)

November 28, 1988

Charles W. Lloyd, Executive Secretary
Defense Acquisition Regulatory Council
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Subject: Interim Defense Department Regulations
Relating to Rights in Technical Data
DAR Case 87-303

Dear Mr. Lloyd:

Moog Inc. is a supplier of high-performance control components and systems for a wide range of defense, aerospace and industrial applications. As an interested party in Government procurement and acquisition activities, we are pleased to provide the DAR Council with comments to Interim Rule 48 CFR Parts 227 and 252 which appeared in the Federal Register, Vol. 53, No. 209, October 28, 1988.

The DAR Council is beginning to recognize the importance of privately-developed technical data and computer software, and the role Private Industry plays in contributing to keeping America's technological superiority by developing innovative products and processes for use in military / aerospace systems. However, further clarification is still required in order to avoid confusion, duplicity and, at worse, harm to Private Industry as a whole.

In the flurry of the many changes to the Department of Defense Federal Acquisition Regulations Supplement, the definitions of "developed exclusively with Government funds", "developed exclusively at private expense", and "required for the performance of a Government contract or subcontract" remain vague and subject to interpretation.

During the course of the last few years, Moog Inc. has received many Government agency inquiries concerning privately-developed data. Each of those inquiries invoke different interpretations of the regulations regarding Rights in Technical Data. Due to the recognized importance of each of those inquiries, dedicated effort is required in order to formulate careful responses. Further, the lack of consistency among the various Government agencies creates additional paperwork requirements and the expenditure of needless time and money. Moog Inc. continues to receive inquiries concerning technical data which were developed at private expense over thirty years ago. This is compounded by each of the procuring agencies maintaining its own set of acquisition regulations. While it might be administratively awkward, the cost savings in the issuance of a uniform set of acquisition regulations to be used by all Government procuring activities would become evident. However, before

such consolidation attempts are made, the current regulations need to be closely examined.

Specifically, the Clause at 227.472-2, Establishing Minimum Government Needs, seems to indicate that Government needs will be determined by the Contracting Officer without regard for the interests of the contracting community. While the same clause cites that the Department of Defense will use the "the least intrusive procedures in order to protect the Contractor's economic interests"... as set forth by DoD Directive 5010.12, DoD Data Management Program, questions still remain as to defining minimum Government needs and minimum Government essential needs.

At Clause 227.473-6, Subcontractors Rights, the prime contractors are given the responsibility to ensure a balancing of interests between the Government and the subcontractors. Further, Clause 227.473-6(b) states that "The prime contractor may not use its obligations to recognize and protect subcontractor rights in technical data as an excuse for failing to satisfy its contractual obligations to the Government". The subcontractors should be given the option of responding directly to the Government and relieve the prime contractors of such an obligation when reasonable grounds exist, following strict procedures, to question the validity of privately-developed data. Otherwise, the procurement environment will continue to be needlessly polarized and wrought with fear and confusion. Marketing personnel at Moog Inc. maintain that higher-tier subcontractors are still demanding complete design disclosure as an "entrance requirement" for participation in Government contracts, in seemingly complete contradiction with Public Law.

At Clause 227.437-1(a), Notification Requirements, (1) through (6), the administrative burden still rests on contractors and subcontractors to include private development representation at the solicitation stage. This will continue to delay timely submittals by contractors / subcontractors, in a time where the Government's main interest seems to revolve around cost issues.

The Clause at 227.437-1(c)(3), Negotiation Time Periods, provides for the setting of a certain date as to Limited Rights and / or Government Purpose License Rights. The Clause ideally should reiterate that contractors / subcontractors are not required to offer for sale valid property rights in technical data.

The Clause at 252.227-7013(j), Notice of Limitations on Government Rights, and Clause 252.227-7013(k), Identification of Restrictions on Government Rights, both still add to the subcontractor's task of providing information at the solicitation stage. Subcontractors should be allowed to defer such representation until after award of a subcontract and within a reasonable time period thereafter. Without such modification, the acquisition regulations would seem to digress to the requirements which existed over 25 years ago.

Finally, it is uncertain whether or not the Interim Regulations remove the excessive and burdensome paperwork and reporting requirements, which far exceeds the Government's legitimate need for information or the expected utilization of data with other than unlimited rights.

Unfortunately, it seems that the Interim Regulations still relegate commercial property rights to a secondary issue while Executive Orders and DoD Policies encourage such commercialization for items developed under federal contracts. Tension will still remain between the Government and its prime contractors and between the prime contractors and subcontractors.

In summary, the DAR Council is encouraged to evaluate all public comment to the Interim Regulations and specifically the comments which will be formulated and sent to you by the Machinery and Allied Products Institute (MAPI) and the Proprietary Industries Association (PIA); Moog Inc. is a supporting and contributing corporate member of both of these organizations.

Very truly yours,

MOOG INC.



Ronald Rozek
Proprietary Data Control Specialist

RR/cld

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS (CODSIA)

1722 Eye Street, N.W., Suite 300
WASHINGTON, D.C. 20006

(202) 457-8713

November 28, 1988
DAR Case 87-303
CODSIA Case 3-85

Defense Acquisition Regulatory Council
ATTN: Mr. Charles W. Lloyd
Executive Secretary
DAR Council
ODASD(P)/DARS
c/o OASD(P&L)(MRS)
Room 3D139, The Pentagon
Washington, D.C. 20301-3062

Dear Mr. Lloyd:

The undersigned associations of the Council of Defense and Space Industry Associations (CODSIA) are pleased to provide comments on the revised interim regulation on rights in technical data and computer software published October 28, 1988. We are also providing these comments to the OMB Office of Federal Procurement Policy in view of their responsibilities under the OFPP Reauthorization Act of 1988. While the revised interim regulation is an improvement over the seriously flawed interim regulation issued April 1, 1988, we are concerned that not all of the significant issues we have previously raised have been addressed and new issues have been raised by the revised interim regulation.

In our opinion, the DAR Council has again fallen short of addressing the data rights issues from the Congressionally-mandated perspective of balancing both the Government's interest and the contractors' interest. The lack of balance will, among other matters, decrease the likelihood that the Government will be able to benefit from the technical and economic advantages of acquiring existing commercial products. Further, the revised regulation does not meet the policy and objectives of the President's Executive Order 12591 to facilitate the commercialization of technology. In this regard, the suggestions by OMB in their June 29, 1988 letter to DoD commenting on the April interim regulation have not been met. Specifically, the language in the regulation on the assignment of rights in technical data and computer software between the Government and the contractor fails to provide sufficiently detailed guidance to assure that the commercialization objectives of the Executive Order will be achieved.

Detailed objections to the published provisions of the regulation are attached to this letter. Additionally, the following major issues critical to the disposition of rights in technical data under a final regulation are omitted or not fully considered.

87-303

Sundstrand Advanced Technology Group

Sundstrand Corporation



no copy

4747 HARRISON AVENUE, P.O. BOX 7002 • ROCKFORD, ILLINOIS 61125-7002 • PHONE (815) 226-6000 • TWX 910-631-4255 • TELEX 25-7440

August 26, 1988

Ms. Eyvette Flynn
FAR Desk Officer
Room 3235
NEOB
Washington, D.C. 20503

Dear Ms. Flynn;

This is written in response to the notice contained in 53 Fed. Reg. 30327 (August 11, 1988), regarding the interim data rights regulations ("the Regulation") published in 53 Fed. Reg. 10519 (April 1, 1988) by the Department of Defense (DoD). It is intended to solely address the unreasonable and expensive paperwork and record keeping burden created by this Regulation.

The Regulation is intended to revise 48 CFR Parts 227.4 and 252.227 implementing the requirements of P.L. 100-180. Instead, with no apparent benefit to the Government and in contravention of the spirit of recent legislation and Executive Orders, it creates significant and onerous paperwork requirements for any contractor using, in the products it manufactures for the DoD, parts developed exclusively at private expense. The Regulation ignores how a contractor designs, develops, and manufactures its products. It disregards the fact that manufacturers track the cost of end items, not the cost of individual piece parts. Further, the DoD's estimate that a contractor will make only twelve responses a year is far from accurate resulting in a very low estimate of total industry burden hours and consequently an underestimate of the total Regulation's cost impact. This discussion will indicate, in detail, the inaccuracy of DoD's estimates.

Sundstrand is typical of many suppliers which design, develop and manufacture technically sophisticated products for the DoD. It designs and manufactures systems and parts for both the commercial and Government aerospace industry markets. Sundstrand's products include, but are not limited to, Electrical Power Generation Systems (EPGS), Engine Start Systems or Secondary Power Supply Systems (ESS), actuation systems, pumps and fans. Each end item and each system is designed and manufactured to meet, in a cost effective manner, the specified operating requirements of a unique aircraft application. A general overview of the process by which the final configuration of an ESS is determined will assist in visualizing the manner in which a customer's requirements are met.

The process begins when an air frame manufacturer determines that it will either modify an existing aircraft or develop a new one, or the military determines it has requirements which must be met by either a new or existing aircraft. Technical requirements, including the ESS, if there is one, are then specified and published. Sundstrand and its competitors will review the requirements and compare them with the capabilities of previously developed systems. In the event that an existing system cannot be used "as is", currently existing designs are reviewed to determine what, with a minimum amount of modification, will most nearly do the job or may be used to reduce development time.

Existing systems usually cannot be used "as is" in a new application. Therefore a "new" ESS is defined which incorporates "as is" parts from previously developed systems, and modifications of previously developed parts and, if necessary, new parts will be developed. Sundstrand and its competitors may even use previously developed parts from another portion of their product line which are not normally associated with the operating group responsible for the ESS. The objective is to produce a competitive, cost effective system which meets or exceeds the customer's requirements. Therefore, consistent with the customer's needs, a minimum amount of development will be undertaken. Although various subassemblies and components will be sold as spares and replacement parts, the objective is to produce a system which meets the customer's specifications.

An ESS will typically have eight line replaceable units (LRU), and approximately 1300 drawings representing the applicable piece parts and subassemblies. This does not include almost 700 drawings which define test equipment designs required to support an ESS. A major LRU will typically have 300 drawings. A minor

LRU may have less than 50 drawings. The financial cost of the development of individual parts are tracked only at the relevant system or LRU level and are not stand alone items within the Sundstrand charging system. Even if development is accomplished under an IR & D project, the project tasks are defined and financially tracked according to a particular concept or system rather than to individual piece parts.

At a later date the development of a different aircraft may be undertaken. Sundstrand and its competitors will repeat the same process. This mix, match and multiple use process for the application of parts is continuous. The more successful the manufacturer and the more varied its product line, the more often the mix and match will occur. A company the size of Sundstrand may well have over 1000 individual products and 200,000 actively used parts to choose from in this process.

The mixing and matching is done by highly qualified engineers who seek to identify appropriate parts for the required application, regardless of whether these parts were developed totally at private expense or were developed in whole or in part with Government funds. Therefore the final configuration of a new end item may well be the product of mixed funding, i.e. a mixture of parts developed with both private and Government funds, and thus, under the April 1, 1988 interim rule, eligible only for Government Purpose License Rights (GPLR). According to the Regulation, if the product supplied is subject to GPLR, the contractor must certify in its proposal and at the time of contract to both the total development cost and its own contributions. The Regulation also requires that license rights and other data issues be negotiated no later than the scheduled delivery date for the data and preferably by the time the contract is signed. It is this certification process and the accompanying negotiation requirement which are major factors in the creation of this onerous paperwork burden.

In order to accurately certify the development cost of mixed funding parts, thereby precluding both civil and criminal liabilities, a contractor will have to attach a charge number to each piece of technical data it produces. Whether such piece parts or data are created for Government or commercial purposes is irrelevant since it is impossible to guarantee that a commercial part will never be used on an end item provided to the Government. This is the only way that the total development cost of a mixed funding item, component or process may be captured.

The category of mixed funding and the license rights which attach to it will become increasingly difficult to monitor. The advent of mixed funding creates a class of parts for which the ownership and the right to use are always in transition. Today, the vast majority of end items are either contractor or Government developed. Few end items are subject to GPLR. However, the mix and match process previously described will inevitably cause more items, components and processes to be subject to GPLR. Therefore the number of certifications regarding incurred development costs will, over the course of time, significantly increase.

The DoD estimates that contractors will need to make only one report, per month, in order to comply with the Regulation's reporting requirements. We disagree. Under the requirement of the Regulation to "list or lose data" in order to retain rights, Sundstrand will have to complete the review, the analysis, and the paperwork for each proposal we respond to. Sundstrand considers a "minor" RFP proposal response to be one with between five and fifteen technical data delivery requirements in the CDRL. A "major" proposal will have in excess of fifteen technical data delivery requirements and sometimes will exceed 100. A single CDRL item may describe a very significantly sized package of technical data. In 1986, Sundstrand responded to 131 major or minor RFP/RFQs. In 1987, Sundstrand responded to 124 major or minor RFP/RFQs. These were in addition to well over a thousand RFP/RFQs requiring less than five CDRL items. Under the April 1988 Regulation, each proposal in response to these requests, plus any other proposal under which even as little as one piece of other than unlimited rights data would be submitted, would require a separate certification.

DoD estimates that response time for the reporting requirement is 84 hours per response. Sundstrand has devised a form, set forth at Attachment A, on which it will record all of the Regulation's reporting requirements. Using DoD's estimate of 84 hours per response to complete the certification, Sundstrand would spend 10,668 hours per year. Using DoD's estimate of 16,743 contractors responding, and assuming an average of 50 responses per year per contractor, all contractors would expend 70,320,600 hours. DoD's total estimate of total burden hours is 2,382,416.

Further, attaching a charge or other identification number to each drawing is a radical change from current Sundstrand and industry procedures of only assigning charge numbers to end items or LRU's. Using the example of the ESS which is currently comprised of eight LRUs and 1300 drawings, only six to fifteen accounts may have been opened. Under the Regulation almost 1300 accounts would have to be created, a more than 160 fold increase.

A charge number will also have to be assigned to every piece of technical data created by Sundstrand whether it is intended for Government or commercial applications. Theoretically costs could be reduced by tracking only those items, components and processes which are both proprietary and key. However no one is able to predict which parts will be critical in the future or in what application they may ultimately be used. Therefore, unless company policy decisions are made to forfeit the ability to certify the cost for certain types of items, components or processes for which other than unlimited rights will be asserted, everything must be assigned a charge number.

For Sundstrand and comparable or larger manufacturers, the scope of such a tracking program is hard to envision. Sundstrand is one of the top 100 Government contractors. A rough order of magnitude estimate is that it has an active library of 200,000 drawings. Each year approximately 10,000 new or revised drawings are made. Therefore the "simple" tracking of the development of technical data will add 10,000 accounts per year outside of any other corporate accounting requirements.

Filling out the Sundstrand-designed data rights form (Attachment A) presumes that the data is available. For a contractor such as Sundstrand this requires that it also track the nature of the limited right and its expiration date, if any. Then it must finally identify the total amount of funding used to develop the item, component or process. As a means of record keeping this will conservatively add approximately two hours to the creation of each drawing. If Sundstrand creates 10,000 new drawings a year 20,000 hours, or 10 man years have been added to the process for a single contractor. Applied on an industry-wide base of 16,743 respondents, and assuming an average of only 3500 new drawings per year per contractor, a total of 117,201,000 man hours are added to the time required to complete drawings. This time was not taken into account by the DoD.

The ramifications of such a change in contractor charging systems mandated by the Regulation is far reaching. At Sundstrand, as at many other manufacturers, the whole cost accounting system would have to be revised to account for this more detailed tracking. Current cost accounting systems are not designed to handle the number of accounts which would be created and would be quickly overloaded. The cost of installing and maintaining a system which could sustain the load would be prohibitive. Further, the increased accounting responsibilities accompanying the creation of each drawing would conservatively increase development time by at least twelve per cent.

The increased cost and time impact of the paperwork and reporting requirements would be further felt at the subcontract level and in actual negotiation of the contract. Subcontractors working on their prime contractor's privately developed parts would be required to provide the same type of development information regarding costs to their primes as their primes maintain for themselves, and they will be required to provide the notification information for their own technical data and computer software. This will increase a subcontractor's costs and extend its delivery time. The exact impact cannot be calculated as it is not known how many subcontracting tiers are included in DoD's estimate of respondees. Further, data rights must be negotiated no later than the scheduled delivery of the data. In order for the prime contractor to complete this task it must be accomplished at the subcontract level as well. It is fair to assume that PCO's will require audits of some of the data rights certifications provided pursuant to the Regulation. The PCO's office will be overwhelmed as it seeks to resolve data rights questions according to the schedule mandated by the Regulation.

Revision of the charging and drawing system only addresses the creation of new technical data. In order to accurately complete the 52.227-7038 certification, the development history of the pre-existing technical data must also be verified. The financial, contractual, and engineering history must be determined. Given the creation process previously described, the development cost of individual parts may be absolutely untracable. This creates a dilemma for the contractor. The contractor cannot complete the certification if there is no basis for making the assertion included in the certification. To avoid making a false statement by not listing the total development cost and the contractor's contribution to it, the contractor does not meet the regulatory requirement and stands a high risk of losing the rights to parts which it may rightfully claim. Either way the contractor loses. If the certification requirement is maintained, there must be some means to preserve and identify rights to parts which were created prior to the implementation of the Regulation. The better alternative is to eliminate the certification requirement.

Finally, the mandated negotiation of data rights no later than the scheduled delivery date, creates an immeasurable and apparently unanticipated burden. The effect on the PCO's office has already been discussed. Government personnel will be swamped. Their work load will increase rather than decrease over time as more parts provided to the DoD are the product of mixed funding efforts. The contractor, for its part, will be forced to go through a validation type exercise (see 252.227-7037) for data items in every proposal in which it states it will be providing technical data with other than unlimited rights.

A validation exercise is both expensive and time consuming. Frequently, it requires the use of outside counsel. It always involves senior engineering and financial people. Sundstrand's most recent response to a challenge, excluding outside legal charges, is estimated to have required 12 full man months. Minus that kind of effort, a contractor would be hard pressed to make an accurate certification to, and then negotiate its data rights with, the Government.

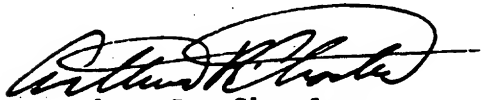
The net result of the Regulation is an increased accounting burden, extended development time and higher product prices. There is little counterbalancing benefit to the Government.

Sundstrand suggests that total development cost and the extent of a contractor's financial contribution should not be the determining factor in the term of the GPLR. Presuming that DoD's objective is to identify all instances of mixed funding and the eventual release, with unlimited rights, of all portions of the technical data developed therefor with Government funds, current accounting systems are able to satisfy this need. We must also note, however, that this objective is somewhat broader than that set forth in the OMB's comments to the Regulation. However, even based on the OMB objective, it is more appropriate that the Government and contractor consider such factors as the key element(s) of the GPLR item, component or process and who paid for their development rather than simple cost allocation.

Under the DoD interim regulations, a GPLR must be negotiated for every item, component, or process resulting from mixed funding. OMB has suggested that this negotiation should occur only when there is a specific need to distribute mixed funding information on a commercial basis. Regardless of the method chosen, the appropriate parts can be identified using current accounting systems, and will have been accomplished without adding to the paperwork requirements of Government contractors or needlessly adding to lead times or costs. Both the Government and its contractors should effectively concentrate their efforts on technological development rather than bookkeeping.

If there are any questions concerning this comment, please address them to Mr. Alan Chvotkin at Sundstrand's Washington Office, (703) 276-1626.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Arthur R. Charles", with a horizontal line extending from the end of the signature.

Arthur R. Charles
Director, Pricing and Contracts

ARC/bt

Attachment

6688305.

under the requirements of DFAR 252.227-7013(j), 252.227-7013(k), (APR 1988), 252.227-7019 (APR 1988) 252.227-7028 (APR 1988), 252.227-7035 (APR 1988), 252.227-7038 (APR 1988), Sundstrand herein provides the Government notice of those items, components, processes and computer software to be utilized in the performance of work for the Government for which are asserted Limited Rights or Government Purpose License Rights (LIR/GPLR), or for which an exclusive right to commercialize is requested. Sundstrand herein reserves the right to revise the list set forth below as necessary and have such list or revisions to this list be incorporated into the contract.

CONTRACT NO. _____

VENDOR _____ **(Name)**

[illegible]

ATTACHMENT B

Comments to: Department of Defense Information Collection Justification

1. The clause at 52.227-7035 does not discuss the monthly reporting and listing of inventions. It is a requirement to identify and list with each proposal submitted to the Department of Defense, all technical data to be submitted with other than unlimited rights.
2. No Comment.
3. No Comment.
4. No Comment.
5. No Comment.
6. The net effect of these regulations is to identify that technical data subject to other than unlimited rights and the existence of any actual or potential Government interest in such data. Determination of exact dollar contribution does not facilitate that goal.
7. The meaning of this sentence cannot be determined.
8. No Comment.
9. No Comment.
10. The meaning of this sentence cannot be determined.
11. No Comment
12. Note that the 84 hours is designated for listing the items and data required to negotiate mixed funding arrangements. No time is allocated for identification and tracking.

B. Sundstrand's calculations are based on 50 responses per contractor per year. This is a rough order of magnitude used to account for major contractors/subcontractors such as Sundstrand and for smaller contractors/subcontractors. This results in total annual reporting hours for technical data of 69,552,000.

1. THE REVISED REGULATION DOES NOT RESOLVE THE STATUS OF CONTRACTS INCORPORATING CLAUSES OF THE PRIOR INTERIM REGULATION.

On September 26, 1988, the OMB Office of Information and Regulatory Affairs advised DoD that the information collection requirement of the April regulation was not enforceable. Since this October revised regulation replaces the April interim regulation, we recommend that contracting officers be directed to offer to replace, without the need for consideration, the contract provisions of the October revised interim regulation for the provisions in contracts which include the April 4, 1988 terms and conditions.

2. THE REVISED REGULATION LACKS PROCEDURES THAT A CONTRACTING OFFICER MUST FOLLOW TO DETERMINE WHAT TECHNICAL DATA THE DOD SPECIFICALLY NEEDS AND HOW TO MEET THOSE NEEDS IN A MANNER THAT IS LEAST DETRIMENTAL TO THE CONTRACTOR'S ECONOMIC INTEREST.

The regulation should be explicit that the Government will not acquire technical data or computer software (regardless of the source of the funding for the development of the item, component or process) unless; 1) the Government has identified a specific need for such data, and 2) the need cannot be met through other means, such as through direct licensing or non-disclosure agreements. The regulation should also provide that the Government will not acquire technical data and computer software for purposes of reprocurement if; 1) the original item is commercially available, 2) a readily introducible substitute will meet the performance objectives, or 3) performance specifications will provide sufficient information.

Where the Government concludes that the acquisition of technical data or rights in data pertaining to an item, component, process or computer software developed exclusively with Government funds is necessary, it should not impose any additional limitations or restrictions on the contractor's or subcontractor's concurrent right to use that technical data or computer software for commercial purposes.

Although we recognize that DoD Directive 5010.12 is referred to in the regulation and is intended to provide guidance to Government procurement personnel on minimum Government needs, it does not adequately address the issues set forth.

3. THE REVISED REGULATION FAILS TO PROVIDE LIMITED RIGHTS STATUS TO PRIVATE EXPENSE DATA NOT PERTAINING TO "DEVELOPED" ITEMS, COMPONENTS OR PROCESSES.

The general category of private expense data not pertaining to developed items, components or processes is completely overlooked in the revised regulation. No legend is apparently authorized for this data and such a legend should be provided.

4. THE REVISED REGULATION DOES NOT LIMIT RECORDKEEPING REQUIREMENTS FOR SUPPORTING THE VARIOUS NOTIFICATIONS, LISTINGS, JUSTIFICATIONS AND REPRESENTATIONS TO TECHNICAL DATA DEVELOPED PRIOR TO THE EFFECTIVE DATE OF THE REGULATION.

The notification, listing, justification and representation of limited rights in technical data applicable to items, components and processes to be used in contract performance, but previously developed, imposes an immense new recordkeeping burden on contractors. For many of these items, the financial, engineering or contractual records needed to support claims of limited rights are simply not available or would entail a major effort to construct. It would be costly and very unlikely that contractors could provide satisfactory documentation for the validation requirement on such data. In order to reduce the paperwork burden that unnecessarily increases the cost of contracting this has to be revised to be more equitable to contractors.

5. COMPUTER SOFTWARE AND SOFTWARE DOCUMENTATION ISSUES NEED FURTHER STUDY BEFORE A FINAL REGULATION IS ISSUED.

CODSIA is concerned that the DAR Council has not given adequate consideration to rights in computer software, computer software documentation, software tools, source code, flow charts and other information relating to proprietary software. The regulation creates such ambiguity in this matter as to deter owners of reusable software components from offering to embed modifications thereof in weapons systems. For example, DFARS 252.7013 (c)(2)(ii) would seemingly grant to the Government unlimited rights in derivative software "generated as a necessary part of performing a contract." However, the term "generated" is nowhere defined and could be interpreted to encompass, by way of example: 1) the trivial translation of a proprietary software component from one computer language to another, or 2) only the reproduction under contract of a software component.

We believe the DAR Council should remove computer software from the technical data regulation and promptly develop and publish for comment a separate, extensively revised, regulation on computer software. We would welcome the opportunity to continue to assist in this endeavor. If no separate regulation on computer software is to be developed in the near future, the October revised regulation must be revised to provide for equitable treatment of software developed at private expense.

6. THE PAPERWORK ISSUES NEED FURTHER STUDY AND CONTROL BEFORE A FINAL REGULATION IS ISSUED.

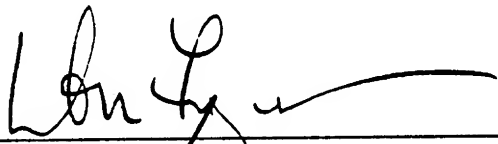
The October revised regulation still creates an immense and unnecessary paperwork burden which is diminished only marginally from the paperwork burden associated with the April interim regulation. The time and expense necessary to compile the required information in order for contractors to comply with the regulation, and for the Government to


evaluate contractors' submissions, will not be cost-effective. In our view, the procurement process will be overlaid with unwarranted administrative complexity and the objective of efficient procurement of supplies and services will not be accomplished.

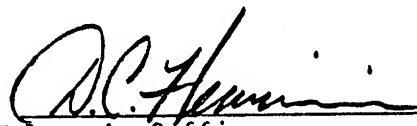
RECOMMENDATION


We recommend that a joint Government/Industry group be established to review the comments submitted on the October revised regulation and develop a final technical data and computer software regulation that complies with the law, the President's Executive Order and the suggestions of OMB, and is a cost-effective means of procurement. The overhaul of the policy on rights in technical data in the early 60's was accomplished by such a joint group. We look forward to meeting with the DAR Council to review our concerns with the revised interim regulation.

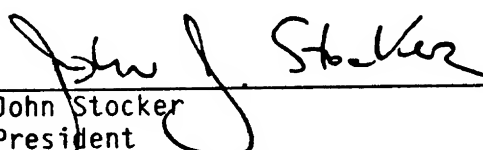
Sincerely,

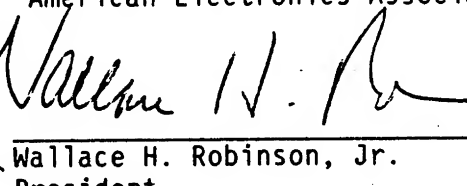

Don Fuqua
President
Aerospace Industries Association


for John L. Pickitt
President
Computer and Business Equipment
Manufacturers Association


for Jean A. Caffiaux
Senior Vice President
Electronic Industries Association


J. Richard Iverson
President
American Electronics Association


John Stocker
President
Shipbuilders Council of America


Wallace H. Robinson, Jr.
President
National Security Industrial
Association

Attachment

* With respect to computer software, in the clause at 252.227-7013, revise (c)(1) Restricted Rights by adding a new subparagraph (iii) which would parallel the proposed new subparagraph (iii) under GPLR above:


"(iii) In cases where the Government would otherwise be entitled to unlimited rights, unless the Contracting Officer determines during the identification of needs process that unlimited rights are required for the purposes of competitive procurement of supplies or services, the contracting officer shall agree to accept restricted rights when the contractor is a small business or nonprofit organization which agrees to commercialize the technology."

* Add the following new subparagraph after 252.227-7013(b)(2)(iii):

"When the government does not have a need to use the data for competition and the contractor is a university or other nonprofit organization which is interested in commercializing the data, the government will negotiate Government Purpose License Rights which will expire if the contractor fails to make reasonable efforts to pursue commercialization."

With my thanks for your interest and attention,

Sincerely,



Patricia B. Tucker
Director, Awards Management
and Resource Information

PBT:gc

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PROPRIETARY INDUSTRIES ASSOCIATION

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November 24, 1988

Defense Acquisition Regulatory Council
ATTN: Mr. Charles W. Lloyd
Executive Secretary, ODASD(P)DARS
C/o OASD(P&L) (MRS), Room 3D139
The Pentagon
Washington, D.C. 20301-3062

Reference: DAR Case 87-303; Comments of PIA to the
interim rule 48 CFR Parts 227 and 252
on technical data/computer software

Dear Mr. Lloyd:

The Proprietary Industries Association (PIA) appreciates the efforts of the DAR Council to assure full industry participation in the formulation of the regulations on rights in technical data and computer software.

We welcome the improvements that were made in the October, 1988 revised interim regulations, but believe they are not without serious flaws. PIA member companies remain deeply concerned that the Government may claim unlimited rights in technical data in prior development or in a minor modification to a product when it has not paid for the development of the product.

We are also concerned that the Government may attempt to claim unlimited rights in technical data when development is required by a prime contract, but the item, component or process is provided by a subcontractor and is already developed. While the listing procedures permit an assertion of limited rights in this case, experience suggests that this interpretation of the definitions is not merely theoretical.

Simply put, we believe if the contractor or subcontractor sells development work, then the technical data pertaining to that development work should be subject to Unlimited Rights. If "development" is not sold, then the Government should not be able to claim Unlimited Rights by virtue of a contractual requirement to produce and deliver an already "developed" item. Under these regulations a contractor or subcontractor who makes innovative manufacturing changes

to their component in support of a Government contract or sub-contract no longer has the option to sell their product without losing rights. Under these circumstances the defense base will continue to erode, as has been well documented by the media and in various studies conducted over the last 4 years, including OFPP's recent letter and the October 1988 Cal Tech report.

The definitions also have the effect of broadening the record keeping requirements associated with Subpart 227.4. In August, 1988, PIA surveyed its members to determine how many hours of data validation response takes under the "historical", imputed definition of developed at private expense. Respondents were also asked to report the number of hours spent when they had to negotiate rights in technical data.

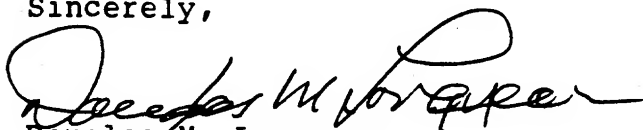
The regulations would require this exercise each time a contract for a privately developed item was awarded. Assuming a universe of 1,000 private expense developers, the regulation would consume 14 million manhours for this tier alone. The results of this PIA survey are attached.

These figures do not account for the time that prime contractors will have to spend overseeing subcontractor marking systems and negotiations. While we acknowledge your DFARS requirement to negotiate for greater data rights in some cases, we are concerned with the dramatic increase in overhead costs this formulation promises to add to Government contracting.

Our suggested changes to the regulations follow. We have tried to focus on those areas which we feel are most critical, and those areas which are in need of clarification. While we recognize that the recommendations we made with respect to the April 1, 1988 regulations are numerous, we are still hopeful that the spirit of the changes we suggested could be captured in a regulation on rights in technical data.

PIA has been encouraged by the report to Secretary Carlucci from Under Secretary of Defense for Acquisition Costello, in which he states that "requirements of the competition advocates for free and open price competition for subcontractors and suppliers have the effect of keeping the supplier base in constant turmoil and make it virtually impossible for defense contractors to build a stable base of reliable, high quality, cost-effective vendors." Since technical data appears to be the preferred means of providing for price competition for components, we remain hopeful that Mr. Costello's industrial base concerns will find their way into the final regulation for the DFARS Parts 227 and 252.

Sincerely,


Douglas M. Longyear
President

PROPRIETARY INDUSTRIES ASSOCIATION (PIA)
Comments to DFARS Parts 227 and 252
(effective 10/31/88); DAR Case 87-303 re.
Interim Technical Data Regulations

(1) DFARS 227.471 and Clause 252.227-7013(a) (DEFINITIONS)

The definitions of "Developed Exclusively with Government Funds", "Developed Exclusively at Private Expense", and "Required for the Performance of a Government Contract or Subcontract" quite literally state (when taken together) that the Government may lay claim to Unlimited Rights (ie., an unrestricted free use) in any technical data associated with any privately-funded "development" work that takes place during and if any contract or subcontract ever necessitated the same "development". The Government need not contribute even a penny of such "development".

This definitional approach makes, quite simply, the words "Expense" meaningless in both definitions, because expense or funding has little to do with eventual right to use. It completely exacerbates the definitional guidelines in the legislative history of Pub. L. 99-500, as well as 3 decades of decisional law, DoD policy and practice.

Development activities, as defined in the FAR, includes test, evaluation, prototypes and product improvements. As a result, the Government will claim Unlimited Rights in changes to a product without paying for the change. Modifications to a already-developed product do not constitute development. This is not clear in the regulations.

Because it is highly unusual for the Government to use unmodified, "off-the-shelf" products in weapons systems, the Government would claim Unlimited Rights in a portion of almost every item, component or process procured from private industry, regardless of who paid for the modification. Application engineering is the norm for PIA's members.

For that portion of the product that the contractor or subcontractor believes to have been developed at private expense, there is an additional problem. In the past, contractors and subcontractors relied on their written agreements with respect to rights in technical data, and the initial source of development funding, as justification for their assertions of private-expense development. Rarely was industry challenged; but when it was, it relied upon records

demonstrating that development work was not charged to nor called out in the contract or subcontract.

Under a firm-fixed-price production contract, there was no need to keep records to demonstrate that a modification (ie., application engineering) not charged to the contract may, or may not, have been necessary under a hardware supply contract.

As a result, the Government will claim Unlimited Rights in technical data pertaining to future product applications for which they do not have to pay. Products and processes developed at private expense in the past may be deemed in the present to be "Developed Exclusively with Government Funds" when challenged under the current regulatory definition.

As we have mentioned before, these definitions do not reflect, in our opinion, the intentions of the Packard Commission. And as we have also mentioned before, the authors of the LMI Report on Technical Data, commissioned and published by the Packard Commission concur that the definition ascribed to "required as an element of performance" (now changed to "required for performance") expands the Government's claim to unlimited rights in technical data much further than they intend.

PIA suggests that the Department confines its reach as follows:

"Developed Exclusively at Private Expense" as used in this subpart, means, in connection with an item, component, or process, or identifiable subpart that no development costs were direct costs under the contract or subcontract and that development of the item, component or process was not required for performance of the Government research and development contract or subcontract. Independent research and development and bid and proposal costs, as defined in FAR 31.205-18 (whether or not included in a formal independent research and development program), are considered funded at private expense."

"Developed Exclusively with Government Funds", as used in this subpart, means, in connection with an item, component or process (or an identifiable subpart) that the costs of development were paid for in whole by the Government as a direct cost under the Government contract or subcontract and that development of the item, component or process (or identifiable subpart) was required for performance of a Government research and development contract or subcontract.

"Required for the Performance of a Government Contract or Subcontract" as used in this subpart, means that the development of an item, component, or process, (or identifiable subpart thereof) was specified as an element of performance in the Government research and development contract or subcontract with the developer."

These definitions would allow the Government to obtain legitimate use rights for its funded research work and would reinstate definitions which acknowledge the source of upfront development funding as a legitimate test of private-expense versus Government funding. The

Government would not be in the position of "specifying" for "development" in the statement of work of a truly nondevelopmental fixed-price production contract, and the concept of private expense could be retained.

Simply stated, these definitions would prevent symantical games-manship from both industry and Government procurement agencies. If a contractor or subcontractor took a Government R&D contract or subcontract then it would have to take it at no cost in order to retain Limited Rights status. If the Government funded the award then it would have Unlimited Rights, or at worst GPLR status.

(2) DFARS 227.473-4 and Clause 252.227-7037 (VALIDATION)

DFARS Clause 252.227-7013 (and 10 USC, Sec. 2320) allow the Government to "negotiate" for rights greater than it would otherwise be entitled to, and to grant back rights to the contractor or subcontractor. If those written agreements, which will result in rights in technical data for one party or the other, do not conform to the definitions of Unlimited Rights or Limited Rights for purposes of validation challenges, and, therefore, cannot be sustained when challenged,

there is little incentive for either party to agree to fewer rights than those to which it is otherwise entitled. This is particularly true in cases where the records to demonstrate conformity with the current regulatory definition of "Developed Exclusively at Private Expense" were not required to be kept prior to 1988.

We concur with CODSIA's recommendation that a sentence should be added to DFARS Clause 252.227-7037 (regarding Validation of restrictive markings) to waive this Clause where a written schedule (list) agreement is negotiated. In other words, a contract should be binding on both parties; otherwise negotiating agreements in a waste of time. Open-ended language such as in DFARS 227.473-1(a)(iii) should be deleted. We suggest the following:

"(d)(5) No right to challenge a restrictive marking shall exist with respect to technical data for which an agreement, such as that contemplated in DFARS 252.227-7013(b)(3), has been reached between the contracting parties regarding the rights with which such technical data was to be delivered to the Government."

- (3) DFARS 227.473-1(a)(3) and -1(b)(1) and Clause 252.227-7013(k) (ESTABLISHING RIGHTS IN TECHNICAL DATA "LISTINGS")

This provision says that items, components or processes in which the proposal (or offeror) asserts Limited

Rights shall be placed in the prime contract "list", unless the Contracting Officer has (specific) grounds to "question" the validity of the restrictive marking. The language is vague and open to administrative abuse. This doesn't refer to or require a validation challenge under 252.227-7037 (presumably because there is no contract right to do so at that point).

It's unclear as to the procedure the Contracting Officer, should follow as to a data rights predetermination either.

This same provision refers the Contracting Officer to DFARS 217-7201 (if appropriate), which sets forth procedures for deciding if and how to compete a component developed at private expense. Acquisition of greater rights is only one option. Our rewritten provision (below) clarified both the reference to 217-7201 and the state of limbo created by the phrasing of the provision. We suggest the following:

- "(b) Establishing Rights in Technical Data
- (1) If the offeror or the contractor is asserting Limited Rights in its technical data, the Contracting Officer shall include the item, component or process in the list in the contract described at 252.227-7013(k). If appropriate, the procedures at 217-7201 will be followed. If necessary, the Contracting Officer will negotiate to obtain greater rights pursuant to 227.472-

3(b)(2). Unless the contracting parties reach a predetermination agreement as to the use of the technical data, all assertions are subject to Government review and possible challenge in accordance with 227.473-4 and 252.227-7037."

PIA is mindful that the new interim regulation attempts to protect subcontractors rights in DFARS 227.473-6(a)(4) and Clause 252.227-7013(i) by requiring prime contractors to protect subcontractor "listing" rights. However, PIA's basic concern hasn't yet been satisfied. That is, an innovative subcontractor probably will not agree to deliver its proprietary data via a subcontract CDRL unless the prime contractor and the Government (as a third-party beneficiary) are contractually bound to recognize the restrictive markings on the data when delivered. The new DFARS definitions (mentioned above), give such a subcontractor no assurance whatsoever that it will continue to have Limited Rights protection. Unless the DFARS recognize this sanctity of contract principle, the DoD simply won't get many of its most innovative subcontractors to agree to deliver truly proprietary data. Please review our more specific comments on page 36 through 38 of our May 31, 1988 Comments document.

(4) DFARS 227.473-2 (INCENTIVES FOR INNOVATION)

Public Law 100-456, Section 806 (November 1988) (codified at 10 USC, Section 2305(d)) prohibits the Government from requiring an offeror to propose to provide the Government with the ability to competitively acquire an item developed exclusively at private expense unless the original supplier of the item is unable to satisfy program schedule or delivery requirements, or the original developer is unable to find a way to meet the agency's mobilization needs.

Since obtaining procurement rights in technical data have been a primary means of providing for competition between identical items, this prohibition must be included in DFARS 227.473-2.

PIA continues to assert that subsection 227.473-2(b)(2) allows the Contracting Officer to "evaluate" a proprietary supplier out of the competition simply because the supplier invokes the protection of 10 USC, Section 2320(a)(2)(B), which allows it to restrictively mark its privately-developed data.

The statute at Section 2320(a)(2)(F) simply prohibits any coercive solicitation or evaluation of privately developed data as a condition of bidding on a contract or for an award of a contract. It quite literally also applies to "subcontracts". Public Laws 99-500, 100-180 and 100-456 support this prohibition. Interim DFARS 227.473-2(b)(2) undermines and negates this statutory protection.

Please review our more specific comments at pages 42 through 45 of our May 31, 1988 Comments document on this point.

(5) DFARS 227.473-6 and DFARS Clause 252.227-7013(i)
(SUBCONTRACTOR RIGHTS)

The provision on subcontractor rights should also be amended to reflect the responsibilities of the Government and an offeror/contractor under Pub.L. 100-456, Sec. 806 (discussed above). The appropriate place to add this reference is in 227.473-6(a) after "10 USC", and in 252.227-7013(i)(1) after "10 USC".

DFARS Clause 252.227-7013(i)(6) is redundant and creates an environment in which constructive default on the part of the prime contractor is inevitable. If the

DFARS prohibited the Government from requiring the prime contractor to secure for the Government greater than Limited Rights in privately-developed technical data, then this provision would not be so onerous. The continuing position of the Government is that it is entitled to ask for reprocurement rights in all deliverable technical data in prime contract solicitations. This is arguably illegal, because it puts the prime in the position of contractually committing to assure subcontractors will in some way sell or otherwise relinquish rights in technical data as a condition of award. This provision establishes a conflict of interest, in fact, given the Government's actual solicitation practices. It should be deleted.

Subcontractors who are entitled to assert Limited Rights in technical data may refuse to sell or otherwise relinquish rights in technical data via negotiation or otherwise. If the outcome of the so-called "negotiation" is presumed due to a contractual commitment in the prime contract, then the prohibition in 10 USC 2320(a)(2)(F) has been violated. It is contrary to the law for the Government to create this situation. It is also contrary to the law for the prime contractor to be forced to refuse to purchase

or require Unlimited Rights or relinquishment of a privately-developed product from its vendors.

(6) DFARS Clause 252.227-7027 (DEFERRED ORDERING)

"The Competition Handbook" (Nov. 1987) printed by the Navy refers to the Deferred Order Clause as follows:

"Deferred Ordering Provisions - This 'LIFESAVER' clause enable the Government to order any data generated under a Government contract, even if not previously specified as a deliverable, for only the cost of reproduction. Thus, if some desired data generated by the contractor under this or a previous contract had not been previously ordered or was omitted from the DD 1423, this clause (DFARS 52.227-7027) permits its ordering as an afterthought."
Id. at p. 84.

The Navy's above reference to this Clause is a classic misuse of the "deferred ordering" concept. That clause is specifically intended for insertion in research and development contracts where the Government intends to (and does in fact) pay monies to acquire title to the technical data and software generated under the R&D contract. It was not intended for hardware production contracts where the Government has not paid "just compensation" to acquire legal title to the data.

The genesis of the current DFARS 52.227-7027 Clause lies in the Armed Services Procurement Regulation (ASPR), and then the Defense Acquisition Regulation (DAR) Clause 7-104.9(m), also entitled "Deferred Ordering of Technical Data or Computer Software." The ASPR and DAR Clauses used the same text language, except that their introductory language required the Clause to be inserted in a contract "in accordance with ASPR/DAR 9-502(c)."

ASPR/DAR 7-104.9(m) (and the present Clause 52.227-7027) only require the contractor to be compensated "for converting the data or software into the prescribed form, for reproduction and delivery" to the Government. In other words, only Xerox costs would be paid to the contractor. Prior ASPR/DAR 9-502(c) explained why this apparent inequity was so. It stated:

"Compensation to the contractor shall not include the cost of generating such data or software since it was already generated in the performance of work for which the Government has already agreed to pay the contractor." (emphasis added)

The ASPR/DAR 9-502 data policy section itself is entitled "Acquisition of Technical Data and Computer Software". Therefore, ASPR/DAR 7-104.9(m) was intended only for Government research and development contracts

where the contractor was paid to develop the data and the Government decided whether to take delivery to it at a later time.

The new interim DFARS equivalent of ASPR/DAR 9-502 is DFARS 227.475-2(c). It has since dropped any reference whatsoever to "acquisition" of technical data, nor any reference to "payment" by the Government for legal title to the data. It simply says if the Government has a "potential need" for the data, then Clause 252.227-7027 shall be inserted in the contract. This is a misuse of that clause.

At the very least, it conflicts with the "listing" scheme included in these interim DFARS for protecting proprietary data.

In order to cure this confusion, the use of Deferred Ordering Clauses should be deleted or confined to research and development contracts.

(7) DFARS 227.472-2(a) (ESTABLISHING MINIMUM GOVERNMENT NEED)

This provision cites a DoD directive which, in its current form, instructs a Contracting Officer as to the types of data that are used to satisfy certain uses of

technical data. The need referred to in the interim DFARS suggests more than a mechanical matching of use to technical data. It implies a judgmental decision that would weigh the burden on the contractor or subcontractor to supply the technical data versus the urgency of the Government need.

Additionally, directive 5010.12 is undergoing revision at this time. The reference should be deleted.

(8) DFARS 227.472-3(b)(2) (RIGHTS IN TECHNICAL DATA)

This DFARS provision allows the Government to negotiate with its prime contractor for Unlimited Rights in its subcontractor's privately-developed data. Use of the word "negotiate" implies mutual assent to an agreement, which certainly wouldn't be satisfied if the subcontractor is left out of the negotiation. PIA strongly supports all of its suggestions on pages 22 through 24 of its May 31, 1989 Comments document. This is a highly improper and fundamentally unfair procedure.

(9) DFARS 227.475-4 (LIMITED RIGHTS DATA TO FOREIGN GOVERNMENTS)

This clause allows a foreign Government access to proprietary data subject only to a non-enforceable

"prohibition" against further use or disclosure. These foreign Governments must first be required, as a minimum, to execute a Non-disclosure agreement with the owner/ developer of the Limited Rights data (similar to the Standard Non-disclosure Agreement in DFARS 227.473-1(d) and demonstrate a means to protect such data.

As an example on April 11, 1988 the Los Angeles Times announced the possibility that General Dynamics was preparing to license "all" technical data for the F-16 aircraft to Japan on a co-production program. This kind of activity could emaciate our defense industrial base and must be more thoroughly addressed in the final DFARS.

(10) DFARS 227.481-1(a)(1) (ACQUISITION OF SOFTWARE

These DFARS similarly disregard who funded the software's development. All of our comments relating to the "definitions" as to technical data similarly apply here.

(11) DFARS Clause 252.227-7035 (CERTIFICATION OF DATA CONFORMITY)

The Certification is, in essence, another form of technical data warranty just like DFARS Clause 52.246-

7001. It should be amended so that the certifying party agrees that the delivered data conforms to all "technical data" requirements of the contract.

Further, just like any warranty, it should have an established cut off date when the certification expires (ie., 52.246-7001 uses 3 years, which is also appropriate here).

(12) DFARS Clause 252.227-7013(1) (DISPUTES)

For mixed-funded items, this provision implies that the prime contractor may negotiate with the Government as to the data rights in a subcontractor's data. It also states that the Contracting Officer may establish the subcontractor's data rights, if negotiations fail.

This provision doesn't comport with the Fifth Amendment due process requirements of the U.S. Constitution. Such so-called negotiated determination of a subcontractor's rights would not be binding on the subcontractor under current federal law. If the Contracting Officer established a subcontractor's rights, the subcontractor does not have access to the military board Contract Appeals rights established by the Disputes Clause. To comply with fundamental due process, the subcontractor (developer) must be able to negotiate its own legal

PROPRIETARY INDUSTRIES ASSOCIATION
Comments to DFARS Parts 227 and 252
(effective 10/31/88): DAR Case 87-303 re.
Interim Technical Data Regulations

ERRATA

Page 18, Point (13), Paragraph A. The reference should be to the September, 1985 DFARS. It should also be noted that the reference to the phrasing which deals with separability does not constitute an endorsement of the September, 1985 regulations, or the definitions therein.

rights and bring legal action in its prime contractor's name if necessary.

(13) (OTHER CLARIFYING SUGGESTIONS)

- A. Although it appears that the concept of protection of privately-developed "separable" baseline technology is incorporated in the regulation, and certainly it has been recognized by the courts, an explicit reference to it in the definitions would be useful. Such a reference was made in the October 1985 interim DFARS.
- B. DFARS 227.472-3(b)(2(ii)) appears to mean that a Contracting Officer may pay for any form of greater rights in technical data (other than Limited Rights). It is confusing as written. It would be clearer if changed to read "Greater rights in technical data, (e.g. GPLR, unlimited rights, etc.) may be paid for by a lump sum fee, royalty and/or other arrangement."
- C. DFARS 227.472-3(c) uses the term "technical data associated with an item, component or process". The words "associated with" appear to mean

something broader than "pertaining to" which is the term used in the statute. "Pertaining to" should be substituted in that provision. This provision also creates a "notice or lose" criteria for mixed-funding development. It seems unnecessary given the other safeguards the Government has built into the regulation.

- D. Federal statutes clearly give "subcontractors" substantive protection in the area of rights in their proprietary technical data. The regulation should be revised to add the words "and subcontractor(s)" in any place that such rights are referenced.
- E. While these regulations are an improvement in tone, additional improvement would help. For example, DFARS 227.472-1 talks about allowing contractors and subcontractors to exclusively exploit technology that they have developed. This is not appropriate for privately developed items.

APPENDIX A

THE PROPRIETARY INDUSTRIES ASSOCIATION SURVEY OF ADMINISTRATIVE BURDEN ASSOCIATED WITH THE RIGHTS IN TECHNICAL DATA REGULATIONS

AUGUST, 1988

DOD ESTIMATES

PIA ESTIMATES (for lower tiers)

No. of respondents 16,500

1,000 *1

No. of responses
per respondent
per year

1

94 *2

No. of hours
per response

84

(a) 143 hrs to satisfy requirements at 227.473-4 and clauses at 252.227-7028 and 7038 (April, 1988) per respondent. Implied at 227.473-1(a)(5) and 252.227-7013(j) (Oct., 1988). *3

(b) 112 hrs to negotiate rights in technical data. (227.472-3, and 227.473(b)(2) before factoring in the definitions at 227.471, April, 1988). At 227.472-3(B)(2) and 227.473-1(c), Oct., 1988, before factoring in the definitions in 227.471. *4

255 Hours Total

TOTAL ANNUAL
REPORTING HRS

1,391,040

14,494,800

*5

- (*1) Assumes 1,000 lower tier suppliers who develop at private expense. An alternate calculation could be derived by assuming burden on a per contract basis. The top 500 R&D defense contractors received 1,289 awards in 1987. Assuming 15 subcontracts involving deliverable technical data for items developed at private expense, per prime contract award; and assuming at least 2 responses to each subcontract solicitation, the Total Annual reporting hours might be

$$[(19,335 \times 255) + (19,335 \times 143)] =$$

$$4,930,425 + 2,764,905 = 7,695,330$$
- (*2) Based on responses to a survey of PIA members, 18 companies responded to an average of 94 solicitations per year which require delivery of technical data and which contain technical data clauses. All of these companies have historically developed product exclusively at private expense.
- (*3) The regs essentially move the validation process to the beginning of the contracting process by virtue of the certifications process. Based on past experience, PIA member companies averaged 143 hours per validation.
- (*4) To negotiate rights in technical data clauses. PIA member companies reported an average of 112 hours per subcontract, in recent years.
- (*5) Assumes companies successfully compete for 10% of the 94 subcontracts for which proposals are submitted. Calculation

$$[(\# \text{ respondents} \times \text{number of responses} \times 142) + (\# \text{ respondents} \times 9.4 \times 112)]$$

Estimated Cost to Industry

	<u>DOD - Tech Data est.</u>	<u>PIA - Tech Data est.</u>
Hours per Response	84	143 per solicitation <u>112 per contract</u> 255 per successful bid
Responses per year		94,000
Total annual hours	1,391,040	14,494,800
Aug. cost per hour	<u>15.43</u> 20,441,664	<u>50.00 (compensation) *1</u> \$724,740,000

*Based on reported industry averages for various occupations including managerial, engineering, financial, and legal at sr. and jr. levels. PIA member companies reported a high degree of involvement of managerial employees in validation and negotiation.



**Shipbuilders
Council of
America**

1110 Vermont Avenue, N.W.
Washington, D.C. 20005-3553
202-775-9060

November 22, 1988

Subject: DAR Case 87-303

Dear Mr. Lloyd:

The Shipbuilders Council of America submits this letter in response to the request for comments on the Department of Defense interim rule to implement section 808 (Rights in Technical Data) of Public Law 100-180. The Council is the national organization representing principal domestic shipbuilders, ship repairers, and the vendors of equipment and services to those industries. This interim rule published on October 28, 1988 in the FEDERAL REGISTER is intended to replace in its entirety the interim rule on the same subject that was published for public comment on April 1, 1988.

The Council's specific comments on the interim rule are set forth below.

1. Definition 227.471

"Detailed design data": line six, "in" should be "an".

"Developed Exclusively with Government Funds":

- o Line five, insert "directly" before "paid". This is what is intended. Omitting "directly" leaves room for the argument that the definition covers items charged to indirect accounts.
- o For the phrase "for the performance of" substitute "as an element of performance under. . ." (See below for explanation.)

"Required for the Performance of a Government Contract or Subcontract":

- o The broadening of the definition of "Required as an element of performance. . ." in the April 1988 interim rule to include "development necessary for performance of a Government contract" had the effect of negating the spirit and letter of the law and of Executive Order 12591. As we stated in our comments on the April 1988 rule, the broadened definition could encompass items developed exclusively at Contractor expense in anticipation of receiving a contract, but which could be said to be necessary for the performance of the anticipated contract. This was a case of the definition being broadened artificially by adding words which subvert the plain meaning of the term being defined.

The drafters apparently have attempted to mitigate this by now removing entirely any reference to "element of performance." But in so doing they have fallen into another trap: "required for the performance of" is now defined as "necessary for the performance of." Since these phrases are identical in meaning, the definition is nonsense.

- o The drafters also attempted to respond to criticism by adding the condition of "accomplished during." This does very little. In the real world, a contractor developing at his own expense an item necessary for the performance of a contract will probably still be developing it up until the moment he uses it on the contract. To shield it from the Government/his competitors under this overreaching definition, he will have to complete development of the item before he signs the contract. This is an unfortunate situation, made even worse by the restrictive definition of "Developed" adopted in 1985. Taken together, the definitions constitute a strong disincentive to a contractor investing funds to improve his competitive position. The natural result will be more expensive products.
- o We recommend that the term and definition in the April 1987 DFARS of "Required as an element of performance under a Government contract or subcontract" be reinstated in place of the subject term and definition, but with the deletion of the last phrase "or that the development was necessary for performance of a Government contract or subcontract."

"Developed exclusively at private expense": we recommend that the following definition be adopted:

"'Developed exclusively at private expense', as used in this subpart, means, in connection with an item, component, or process, that no part of the cost of development was paid for directly by the Government and that the development was not required as an element of performance under a Government contract or subcontract. Items, components, or processes for which the costs of development are charged as indirect costs against Government contracts or a Government contract shall not be considered as paid for directly by the Government; such indirect costs specifically include, but are not limited to, independent research and development and bid and proposal costs as defined in FAR 31.205-18 (whether or not included in a formal independent research and development program)."

This definition overcomes the following objections to the proposed definition:

- a. It encompasses the points raised above regarding "element of performance."
- b. The sentence beginning "All other indirect costs. . ." is not needed because if development was required as an element of performance in a Government contract or subcontract, then the item comes under the definition of "Developed exclusively with

Government funds."

- c. It goes some way toward defining "indirect costs," rather than using a new term whose meaning is not entirely clear from the context.
- d. The proposed definition has an air of being tacked together (which it has been). The substitute integrates and rationalizes the concepts of indirect costs and IR&D and B&P costs, making obvious that IR&D and B&P costs are types of indirect costs.

The changes to the DFARS by the DAR Council noted in the preceding comments are of the same stripe. They represent attempts to reach more of a contractor's technical data developed at private expense. As such, they are contrary to both the spirit and the letter of the law (10 U.S.C. 2320 and 2321) and of Executive Order 12591. The purpose of these provisions of law was to foster creativity and innovation in the defense industries. The revisions noted will have the opposite effect; they should be withdrawn in the interest of maintaining a strong defense industrial base.

2. Computer software

There are many inconsistencies in the treatment of computer software:

- o The definitions of "Developed exclusively with Government funds," "Developed exclusively at private expense," and "Required for the performance of a Government contract or subcontract" make no mention of computer software. Yet the clause at 252.227-7013(c)(1)(ii) addresses "commercial computer software and related documentation developed at private expense." Do the listed definitions not apply to computer software? If not, why not?
- o By title, section 252.227-7013(i) deals with technical data and computer software. Subparagraphs (2) and (4) refer to "technical data or computer software" [though subparagraphs (3) and (6) omit inclusion of computer software; was this an error?]. But subparagraph (1) invokes 10 U.S.C. 2320 and 2321 and DFARS 252.227-472-1 [it is assumed 227.472-1 is meant], all of which by title and content address only technical data.
- o Section 227.473-1 by title covers only technical data. Yet the procedures in this section mention technical data and computer software. Reference is made to section 252.227-7013(j), which requires notification regarding "items, components, processes and computer software."
- o Subparagraph 227.473-1(a)(5)(ii) requires the provision at 252.227-7028 which obliges the contractor to identify deliverable technical data which it has delivered or will deliver under other contracts. No such requirement is made for computer software. Is this intentional?

- o The policy at 227.473-1(b)(2) provides for the contractor to obtain exclusive commercial rights in technical data developed under a contract, and to negotiate rights in technical data pertaining to items, components or processes developed with mixed funding. No such provisions are made for rights in computer software.
- o 252.227-7013(c)(1)(ii)(C) obliges the Government not to make restricted rights computer software available to third parties without the prior written approval of the contractor. There is no such agreement with respect to technical data furnished with limited rights.
- o It has been stated elsewhere that this interim rule deletes the "list or lose" requirement. This is apparently the case with technical data. Yet the clause at 252.227-7019, which is required [by 227.481-2(b)(2)] for negotiated contracts in which the clause at 252.227-7013 is required, states, "If no such computer software [to be delivered with restrictions] is identified, all deliverable computer software will be subject to unlimited rights." This is list or lose. Furthermore, the listing requirements in 252.227-7019 are redundant to or inconsistent with those in 252.227-7013(j) and (k).
- o Section 227.475-4 deals with delivery of limited rights technical data to foreign governments. Section 227.481 says nothing about delivery of computer software to foreign governments.
- o Section 227.481-2 allows for deviations from section 227.481 to be requested from the DAR Council. No such deviations are provided for with respect to technical data.
- o Contractors who inadvertently omit restrictive markings on technical data or computer software may correct the omission. Under 227.481-2(d)(2), there is no time limit on correction of computer software markings. Under 227.473-3(c), however, the contractor may make corrections to technical data markings "within six months after delivery."
- o In 227.473-1(c)(3), GPLR and limited rights are mentioned in connection with computer software.
- o In 252.227-7013(f), the Government's treatment of unjustified or nonconforming markings on technical data is different from the treatment of markings on computer software.
- o Should 252.227-7013(i)(3) cover computer software as well as technical data?

These seeming inconsistencies in treatment of computer software should be verified. If the different treatment is intentional, this should be noted explicitly in the policy section.

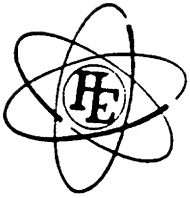
4. With respect to section 227.472-2(b), the reference to 227.472-3(a)(1) is not understood. Perhaps the reference intended is 227.472-3(a)(1)(iv).
5. In section 227.472-3:
 - o Line four, "limiting" should be "limited."
 - o In subparagraph (b)(1), line eight refers to "the limited rights legend," but there is no antecedent for this reference. If it refers to the limited rights legend at 252.227-7013(b)(3)(iii), this should be explicit.
6. In section 227.473-1:
 - o See note above regarding inconsistent treatment of computer software.
 - o In subparagraph (a)(1), line eight, reference is made to "contractor's or any subcontractor's intended use. . ." of items, etc., for which technical data will be submitted with other than unlimited rights. Subparagraph (a)(2)(ii) gives the conditions under which an offeror's proposal may be deemed to be unacceptable if such information is not submitted, and refers to 252.227-7013(j).

There is a serious deficiency here. With the deletion of 252.227-7035, 7013(j) now appears to be the only clause in the regulations which attempts to impose on the offeror/contractor a duty to notify the Government prior to use of an item, etc., for which technical data will be furnished with other than unlimited rights. However, 7013(j) does not specifically address "intended use" or "prior use," but only "use."

In view of the "list or lose the contract" tone of subparagraph (a)(2)(ii), the requirement for advance notice should be made much more explicit than it is. The 7013 provision has historically been a contract clause, and in all other respects but section (j) is still a contract clause, as opposed to a solicitation clause. It is suggested either:

- a. a separate solicitation clause along the lines of former 7035 be promulgated; or
- b. the language in 7013(j) be clarified appropriately and that a preamble to the whole clause be used in solicitations calling attention to the solicitation aspects of 7013(j).

Furthermore, subparagraphs (a)(2)(ii) and (a)(3)(i) should be couched in terms of best efforts by the contractor. A contractor -- for example, a shipbuilder -- may anticipate having thousands of vendors on a ship construction



Hydra-Electric Company

3151 KENWOOD • BURBANK, CALIF. 91505-1052
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18 November 1988

DEFENSE ACQUISITION REGULATORY COUNCIL
The Pentagon
Washington, D.C. 20301-3062

Attn: Mr. Charles W. Lloyd
Executive Secretary
DAR Council
ODASD(P)/DARS
% OASD(P&L)(MRS)
Room 3D139

Subj: DAR Case 87-303
Interim DFARS Effective 10/31/88

Ref: Federal Register
Vol. 53 No. 209
Friday, October 28, 1988

Gentlemen:

Hydra-Electric Company is a small business engaged in the manufacture of commercial and military proprietary pressure switches, thermal switches and flow control valves. These products are based upon technology and trade secret processes and techniques developed at private expense during the company's thirty (30) years of existence. The products are supplied for aerospace, ground and sea based weapon systems.

New applications resulting from requirements generated by prime contractors, first and second tier subcontractors are engineered and produced by scaling or modeling from previously produced hardware, i.e. applying the technology, trade secret processes and techniques developed at private expense. The technology, trade secret processes and techniques are private property and assets of the company. As with other company assets, they cannot be sold or negotiated away without devaluing or destroying the company.

Hydra-Electric's products are essentially low cost, non-repairable throwaway components. The Government has no need for data to competitively procure spare parts or field support for low cost, non-repairable throwaway items. Hydra-Electric believes such items should be exempt from the regulations.

MANUFACTURERS OF PRESSURE ACTUATED SWITCHES
GAUGE • DIFFERENTIAL • ANEROID • ABSOLUTE • VACUUM
ZERO ABSOLUTE TO 3000 PSI

The switches and valves may be competitively procured at the LRU (Line Replaceable Unit) level by use of the requirement/specification data generated by the prime contractor or the subcontractor as the Government has unlimited rights to that data.

Under the proposed regulations, especially the definitions, scaling/modeling of our baseline technology to fit a new application could be construed as "mixed funding development" and would be subject to Government Purpose License Rights. This of course would destroy a company such as Hydra-Electric by forcing disclosure and release of the basic proprietary technology and trade secret processes which are the main assets and private property of the company.

As a small business, Hydra-Electric does not have the sophisticated accounting systems to segregate, accumulate and fully document Internal Research and Development/Bid and Proposal Expenses. However even with an accounting system to accomplish those tasks, the interim regulations would still probably force an interpretation that "mixed funding development" was involved in any new application or program because of the nature of small business operations.

When approached by a Prime or a subcontractor for a proposal or a bid on a new requirement or application, a small business will submit a conceptual drawing to the requester along with his commercial proposal. It is not feasible to make complete manufacturing drawings or complete all testing prior to submission of the proposal due to time and financial constraints. The probability of success in obtaining a contract is usually one in ten because of the number of firms solicited.

The conceptual drawing simply indicates that based upon utilization of its technology and trade secrets the small business can through application and manufacturing engineering prepare data to manufacture and test a component which will meet the requirements of the requester's specification/requirements after receipt of a contract or purchase order. Since the data would be prepared after award and based upon its record in the last four (4) years, the Government would claim "mixed funding development" under the proposed regulations.

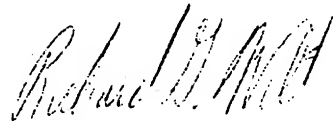
Hydra-Electric could not accept a purchase order or contract under those conditions.

DAR COUNCIL
18 November 1988
Page 3 of 3

Hydra-Electric could not accept a production contract with a deferred data ordering clause unless the data were fully defined and the rights to such data were irrevocably defined in the initial purchase order or contract.

Hydra-Electric Company fully supports and endorses the efforts of the Proprietary Industries Association to protect the property rights of innovative contractors and subcontractors through their position papers, comments and suggestions to the DAR Council as they are the only organization which represents the interests of small business in this regard.

Sincerely,
Hydra-Electric Company

A handwritten signature in dark ink, appearing to read "Richard G. Wilt", written in a cursive style.

Richard G. Wilt
Executive Vice President

September 19, 1988

The Honorable Robert B. Costello
Under Secretary of Defense
for Acquisition
The Pentagon, Room 3E933
Washington, D.C. 20301-8000

Dear Secretary Costello:

My August 26, 1988 letter to you stated United Technologies' concerns relative to certain provisions of the interim rule on rights in technical data and computer software (DFAR 52.227-7013). We now understand that Mrs. Spector has agreed to meet with a group from the Defense Policy Advisory Committee on Trade (DPACT) to discuss industry concerns prior to issuance of the final rule on this subject.

We are very pleased that this opportunity to present our views is being afforded and that the final rule may reflect a more equitable government/industry balance. In the interim, United Technologies will accept contracts containing DFAR 52.227-7013, on the assumption that all definitions contained in the aforementioned DFAR relate only to that clause and do not change other regulations.

Thank you for your consideration of this matter, and we look forward to the results of the DPACT meeting with Ms. Spector.

Sincerely,



Frank W. McAbee

/mat

AQ000317888

14.

→ "Required as an Element of Performance Under a Government Contract or Subcontract", as used in this subpart, means, in connection with the development of an item, component, or process, that the development was specified in a Government contract or subcontract[.] ~~or that the development was necessary for performance of a Government contract or subcontract.~~

"Restricted rights", as used in this subpart, means rights that apply only to computer software, and include, as a minimum, the right to-

(a) Use computer software with the computer for which or with which it was acquired, including use at any Government installation to which the computer may be transferred by the Government;

(b) Use computer software with a backup computer if the computer for which or with which it was acquired is inoperative;

(c) Copy [reasonable numbers of] computer programs for safekeeping (archives) or backup purposes; and

(d) Modify computer software, or combine it with other software, subject to the provision that those portions of the derivative software incorporating restricted rights software are subject to the same restricted rights.

~~In addition, restricted rights include any other specific rights not inconsistent with the minimum rights in (a) (d)~~

[Signature]

contract. It is impossible to tell in advance of the contract who all these vendors will be. A contractor should not be expected to use more than his best efforts to contact all these vendors and obtain the listing of technical data called for here. There should be specific language instructing the contracting office to take such situations into account. The language in (a)(3)(i) should be "all known technical data" or "all readily ascertainable technical data," not "all technical data."

- o In subparagraph (a)(1)(iii), line seven, change "if" to "for which" and change "is" to "are". This seems closer to what is intended.
- o With the deletion of reference to 252.227-7035, subparagraph (a)(2)(i) now is redundant with (a)(1), into which it should be merged. If it stays, "or computer software" should follow "technical data."
- o The language in the second sentence of subparagraph (a)(2)(iii) is somewhat infelicitous. What are at issue are not "rights in technical data to which the offeror is otherwise entitled," but "rights in technical data which the offeror is entitled to withhold or restrict."
- o Subparagraph (a)(3)(ii) refers to "bilateral modification of the list" of technical data to be delivered with restrictions on use. The Proprietary Industries Association has raised the question whether a subcontractor (or contractor) could jeopardize schedules by refusing to deliver critical technical data until his restrictions have been accepted and added to the contract list. This is a valid point. We suggest deletion of the term "bilateral." The Government is adequately protected by the procedures in subparagraph 227.473-1(b)(1), which are discussed below.
- o In subparagraph (a)(4), line six, add "or computer software" after "technical data." In line twelve, again, the word "prior" is used whereas 255.227-7013(j) speaks only to use.
- o In subparagraph (a)(5)(ii), is computer software intended to be included?

Also, we suggest that the title of 252.227-7028 is not accurately descriptive of the content or purpose of this clause. A better title would be "Notification of Previous Delivery of Technical Data" or something similar. This would also alleviate confusion with the representation in 252.227-7013(j).

In subparagraph (a)(6), such confusion between "representations" is evident. This subparagraph immediately follows the section referring to the "Requirement for Technical Data Representation" in 252.227-

7028, but (a)(6) apparently is referring to the representation in 252.227-7013(j).

- o Subparagraph (b)(1) refers to "the technical data" in the third line, but it is not entirely clear what is the antecedent. Perhaps "the" should be deleted.

Also, the language of this subparagraph (b)(1) should be strengthened so that it is not susceptible of interpretations by contracting officers that may result in delays in approving listing of a contractor's restricted technical data. As noted above in connection with subparagraph (a)(3)(ii), this could lead to schedule delays when subcontractors refuse to sign contracts or deliver technical data until they are listed. The language should be to the effect that: "The contracting officer shall add the limited rights data to the contract list. Then he may either challenge under 252.227-7037, or he may negotiate rights under 217-7201 and 227.472-3(b)(2)." In neither case is progress held up by a refusal to sign a contract or deliver technical data until the listing is approved.

- o In subparagraph (b)(2), "should" should be "shall." The contracting officer should be under mandate just as much as the contractor. The intent is to balance the Government's and the contractor's interests.
- o Same in (b)(3), change "will" to "shall" in line four. This tracks the language in 10 U.S.C. 2320(a)(2)(E).
- o Same in (b)(3)(i), change "will" to "shall." The remainder of the language in this subparagraph does not meet the requirements of 10 U.S.C. 2320(a)(2)(E). This section of the law requires the establishment in the regulations of criteria for determining when negotiations in mixed funding situations are impracticable. The only criteria given for this determination are that "there are numerous offerors" or "under urgent circumstances." These "criteria" are too vague and subject to abuse. Specific, narrowly defined criteria should be provided.
- o In subparagraph (c)(2)(i), the April 1988 language "have an immediate need" has been changed to "anticipate an early need." This language, subtle though the change may be, makes it easier for the Government to justify withholding greater rights from the contractor. The language used in the April 1988 rule should be reinstated.

Line five, "may" should be "shall." In the April 1988 rule, the word was "will."

Line seven, "should" should be changed back to "shall" as it was in the April 1988 rule.

The same types of changes have been made in (c)(2)(ii) and

(iii). The language from the April 1988 rule should be reinstated.

7. In section 227.473-3:

- o The provision in subparagraph (c) is of little use because it is not in any contract clause. This very important right should be in the contract; it could easily be incorporated into 252.227-7013(f). Also, the Government's relief from liability in subparagraph (c)(3) should be limited and should be more explicit. Better language would be, "Relieves the Government of liability for unauthorized use, release or disclosure of the technical data which may have occurred before the technical data were marked by the Contractor." The same is true with respect to computer software in 227.481-2(d)(2).

8. In section 227.473-5(c), the allusion to 252.227-7031, Data Requirements, is not understood. The April 1988 language was to the effect that the clause at 252.227-7036, Certification of Technical Data Conformity, shall be included in any contract in which delivery of technical data are required. The new language does not directly make this connection. Just because a contract contains the 7031 clause does not necessarily mean that it requires delivery of technical data. The connection should be more direct.

9. There are two problems with new section 227.473-6, Subcontractor Rights, and with new subparagraphs (1)(1), (5) and (6) in 252.227-7013:

- o The list or lose requirements of the April 1988 rule, it was soon realized, fell very hard on subcontractors. Because of the protests from industry (in many cases from prime contractors who were looking after the interests of their subcontractors), these ill-advised requirements were mitigated somewhat. Now comes new regulations couched in terms of protecting subcontractors from prime contractors against a problem which has already been ameliorated by other changes in the regulations. Much of this new material is superfluous or gratuitous, viz:

- a. Contractors, including prime contractors, are constantly aware and have always been aware that they "must satisfy their contractual obligations to the Government while ensuring that the rights afforded subcontractors. . . are recognized and protected" [227.473-61(a)]. It was the Government/DAR Council's insistence on preaward/postaward notification and list or lose that made this aspect of contracting so much more onerous (and which, as we have pointed out, will make the product so much more expensive), not anything the prime contractors have done. This new language is gratuitous.

- b. The requirements of 227.473-6(a)(1), (2) and (3) and

of 252.227-7013(1)(2), (3) and (4) have long been in the regulations under other headings, they are superfluous.

c. The language of 227.473-6(b) is also gratuitous. It is a natural reaction by the drafters to the well-founded outcry from defense contractors that the new notification and listing requirements will stretch out schedules. This will be due to the sheer volume of extra paperwork required and the questions and disagreements with subcontractors which will undoubtedly increase. Whether contractual obligations will be met in any given case will depend on how well a contractor can take account of these stretch-out factors in his bid and how expeditiously the contract and the Government handle these questions.

- o In most design contracts, it would usually not be possible or desirable for a subcontractor to furnish limited rights data directly to the Government, bypassing the prime contractor. In such situations, the contractor is acting for the Government in reviewing and approving designs, and requires the technical data to fulfill this function. Or, the subcontractor's technical data will be incorporated in the contractor's design. These situations should be recognized and exceptions noted in subparagraph (a)(2) and in 252.227-7013(e)(3).

10. With respect to 227.475-2:

- o In subparagraph (b), line thirteen, "item" should be plural.
- o In subparagraph (c), antepenultimate line, "rights in" should be inserted before "technical data." This is more correct.
- o Add subparagraph (d) as follows:

"In no case shall the Contracting Officer use deferred delivery or deferred ordering as a substitute for listing technical data on the Contract Data Requirements List (DD Form 1423). Just as the Contractor is required under these regulations to list in advance all readily ascertainable technical data and computer software it intends to delivery with other than unlimited rights, the Government is held to the same standard: to notify the Contractor in advance of all readily ascertainable technical data and computer software it requires delivery of."

11. In section 227.481-2:

- o In subparagraph (b)(4), line eight, "development" should be "developed."

- o In subparagraph (c)(2), the Restricted Rights Legend appears to be three lines long, ending with "(Name of Contractor)," in smaller typeface. However, the text following the legend is in the same size typeface until the end of the section. This should be corrected.

This subparagraph states, "The Government shall include the same restrictive markings on all its reproductions of the computer software. . .etc." However, the contract clause [252.227-7013] does not impose this requirement on the Government. The clause should be modified accordingly; ideally, the requirement should appear in the restricted rights legend.

12. With respect to 252.227-7013:

- o In subparagraph (b)(2), line sixteen, after "data" add "by the recipient." This is what is intended.
- o There are two objections to the legends:
 - a. In referring to "restrictions. . .set forth in the definition of blank rights in paragraph blank of the clause at 252.227-7013 of the contract listed above," it is doubtful the legend would be considered sufficient notice by a court. The legend should not require the holder of technical data to refer to another document -- to which he or she may not have immediate access -- to learn what restrictions are on the data. The legend should spell out the restrictions.
 - b. It is difficult to tell in some cases where the legends end. The legends should be set in different type or otherwise set off.
- o In subparagraph (b)(3)(i) the reference to "(a)(1) above" is incorrect. The reference should be to "(b)(1)(ii)-(viii) above."
- o In subparagraph (c)(1)(ii), in item (B), "User" should be "Use."
- o In subparagraph (e)(2), the matter in parentheses is not parenthetical. The parentheses should be deleted.
- o In subparagraph (j)(2), line 3, substitute "for which" for "if" and "are" for "is." In line 4, substitute "for which" for "if." In line 5, insert "or computer software" after "data" and substitute "are" for "is." This is closer to the intended meaning; "data" is a plural noun.

13. With respect to 252.227-7018:

- o Is it intended in (b)(3) that a subcontractor would review

the procedures of lower-tier subcontractors? Would a contractor review procedures of a subcontractor more than one tier down?

- o In subparagraph (c), is it intended that a subcontractor should notify only the next-higher-tier contractor, or must he notify the Government directly? If the former, must the contractor in turn notify the Government? This should be clarified.
- o Subparagraph (f) does not go far enough. For example, if applied literally, the first line in the clause would read "The subcontractor or any subcontractor. . . ."

14. With respect to 252.227-7019:

- o In the first line, "Officer" should be "offeror."
- o In the second line, the use of "such" is not understood. Should "such" be deleted?

15. With respect to 252.227-7020, the copyright notice is rendered incorrectly in subparagraph (b) in all three instances.

16. With respect to 252.227-7026, in line 10 of the clause (excluding the title), "technical" should be inserted before "data."

17. With respect to 252.227-7027, in line 7 of the clause (excluding the title), the term "technical data" is used, whereas in the clause at 252.227-7026, the corresponding usage is "data." This is an example of the use of "data" where apparently "technical data" is meant.

18. Item 252.227-7034 should be deleted as not pertinent.

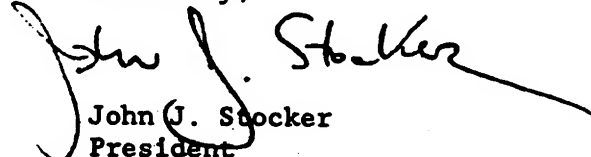
19. Preaward Validation

Provision should be made for preaward validation of claims to rights in technical data and computer software. It is easy to construct a scenario in which a potential sole source subcontractor (or contractor) refuses to sign a contract until his claim to rights in technical data is validated by the Government. Section 227.252-7037 provides a validation procedure, but it is couched in terms of a postaward, Government-contractor relationship, and it also has built-in delays. The new procedure should provide for special "fast-track" validation of the technical data rights claims of potential contractors/subcontractors.

The Council appreciates this opportunity to comment on the interim rule. We hope the DAR Council will find our comments of assistance in developing the final rule on rights in technical data.

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Sincerely,


John J. Stocker
President